(25,315)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 1032.

KATE P. McNAUGHTON, APPELLANT,

vs.

HIRAM W. JOHNSON, GOVERNOR OF THE STATE OF CALIFORNIA, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 29, 1916.

1 & 2 Supreme Court of the United States.

KATE P. MCNAUGHTON, Appellant,

vs.

HIRAM W. JOHNSON, Governor of the State of California; U. S. Webb, Attorney-General of the State of California, and Thomas Lee Woolwine, District Attorney of Los Angeles County, California, Appellees.

TRANSCRIPT OF RECORD.

Upon Appeal from the District Court of the United States of America in and for the Southern District of California, Southern Division.

3 *Names and Addresses of Attorneys.*

For Appellant: Tom L. Johnston, Esq., 221 O. T. Johnson Building, Los Angeles, California.

For Appellees: U. S. Webb, Esq., Attorney General of the State of California, Sacramento, California; Robert M. Clarke, Esq., Assistant to the Attorney General of the State of California, Los Angeles, California; Thomas Lee Woolwine, Esq., District Attorney of the County of Los Angeles, Los Angeles, California; George E. Cryer, Esq., Deputy District Attorney of the County of Los Angeles, Los Angeles, California.

4 In the District Court of the United States in and for the Southern District of California, Southern Division.

C-19. Equity.

KATE P. MCNAUGHTON, Plaintiff,

vs.

HIRAM W. JOHNSON, Governor of the State of California; U. S. Webb, Attorney General of the State of California; Thomas Lee Woolwine, District Attorney of Los Angeles County, Defendants.

Citation on Appeal.

UNITED STATES OF AMERICA, *ss:*

To Hiram W. Johnson, Governor of the State of California; U. S. Webb, Attorney General of the State of California, and Thomas Lee Woolwine, District Attorney in and for the County of Los Angeles, State of California:

You, and each of you are hereby cited and admonished to be and appear before the Supreme Court of the United States, to

be held at the city of Washington in the District of Columbia, on the 10th day of June, 1916, pursuant to an order allowing an Appeal, filed and entered in the Clerk's office of the District Court of the United States for the Southern District of California, Southern Division, from a final decree filed and entered on the 8th day of April, 1916, in that certain suit being in equity No. C-19, wherein Kate P. McNaughton is Complainant and Appellant and you are Defendants and Appellee-, to show cause, if any there be, why the decree rendered against said Appellant as in the said Order allowing appeal mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. O. A. Trippet, United States District Judge for the Southern District of California, Southern Division, this 12th day of April, A. D. 1916, and of the independence of the United States, the one hundred and fortieth.

OSCAR A. TRIPPET,
United States District Judge for the Southern District of California, Southern Division.

Received copy of the foregoing Citation on Appeal and hereby acknowledge service, this, the 12th day of April, 1916.

U. S. WEBB, *Att'y General;*
ROBERT M. CLARKE, *Deputy;*
THOMAS LEE WOOLWINE,
Dist. Att'y;
GEO. E. CRYER, *Chief Dep.,*
Solicitors for Defendants and Appellees.

[Endorsed:] No. C-19. Equity. United States District Court, Southern District of California, Southern Division. Kate P. McNaughton, Plaintiff, vs. Hiram W. Johnson, et al., Defendants. Citation on Appeal. Received copy of within Citation this 12th day of April, 1916. Thomas Lee Woolwine, Dist. Att'y; Geo. E. Cryer, Ch. Dep., Attorney- for —— ——. Tom L. Johnston, Esq., Attorney for Plaintiff. Filed Apr. 12, 1916. Wm. M. Van Dyke, Clerk, by T. F. Green, Deputy Clerk.

7 In the District Court of the United States in and for the Southern District of California, Southern Division.

No. C-19. Equity.

KATE P. MCNAUGHTON, Complainant,

vs.

HIRAM W. JOHNSON, Governor of the State of California; U. S. Webb, Attorney General of the State of California, and Thomas Lee Woolwine, District Attorney of Los Angeles County, California, Defendants.

8 In the District Court of the United —— in and for the Southern District of California, Southern Division.

In Equity.

KATE P. MCNAUGHTON, Plaintiff,

vs.

HIRAM W. JOHNSON, Governor of the State of California; U. S. Webb, Attorney General of the State of California, and Thomas Lee Woolwine, District Attorney of Los Angeles County, California, Defendants.

Bill of Complaint.

Kate P. McNaughton, as complainant brings this her Bill of Complaint against said defendants and each of them, and thereupon your orator complains and says:

I.

Complainant is a citizen of the United States of America, over the age of twenty-one years, and resides in the City of Los Angeles, County of Los Angeles, in the State of California.

II.

That Hiram W. Johnson is the Governor of the State of California, that U. S. Webb is Attorney General of the State of California, and that Thomas Lee Woolwine is the District Attorney of the County of Los Angeles, State of California, and that said last named defendants in their respective capacities named are holding
9 office under and by virtue of the laws of the State of California.

III.

Complainant is a regularly graduated op-thalmologist, which is a school of scientific learning and practice confined to the treatment of the imflam-ation of the eye and its membranes and in fitting glasses to the human eye; that complainant has practiced her said

profession in the City and County of Los Angeles, in the State of California for the past three years; that she is dependant entirely upon the proceeds of her labor and services as a practicing op-thalmologist; that complainant does not employ either medicine, drugs or surgery in her practice as a- op-thalmologist as aforesaid, or is there anything employed in her practice that is hurtful to the individual or dangerous to society.

IV.

Complainant further alleges that in her practice of her said profession of op-thalmology in the treatment of the inflam-ation of the eye and its membranes, it is absolutely necessary and indispensable that she measure the powers and range of human vision without the use of drugs; that there is no law in the State of California prescribing an examination for and regulating the practice of op-thalmology.

V.

Under the laws of the State of California, complainant alleges it is the duty of the Attorney General thereof amongst other things, to attend the Supreme Court of said State, to defend all cases to which said State is a party, and when required by the public service, or directed by the Governor, to repair to any County in the State to assist the District Attorney thereof in the discharge of his duties, and it is the duty of the District Attorney of Los Angeles County to attend the Superior Court and other Courts, and to conduct on behalf of the people of the State of California, all prosecutions for public offenses.

VI.

That the Legislature of the State of California, at its Fortieth session, which began on Monday, January 6th, 1913, and adjourned on Tuesday, May 12th, 1913, enacted the following law, in words and figures as follows, to-wit:

"An Act to Regulate the Practice of Optometry; to Provide for the Appointment of a Board of Optometry, Define its Duties and Powers and Prescribing a Penalty for the Violation of this Act.

The People of the State of California do enact as follows:

Section 1. It shall be unlawful for any person to engage in the practice of optometry without having first obtained a certificate of registration from the state board of optometry as provided for in this act or under the provisions of a certain act entitled "An act to regulate the practice of optometry and for the appointment of a board of examiners in the matter of said regulation," approved March 20, 1903, and acts amendatory thereof.

Sec. 2. The practice of optometry is hereby defined to be the employment of any means other than the use of drugs for the measure-

ment of the powers or range of human vision or the determination of the accommodative and refractive states of the human eye or the scope of its functions in general or the adaptation of lenses or frames for the aid thereof.

11 Sec. 3. A board is hereby created to be known as the state board of optometry which shall consist of three members appointed by the governor. No person shall be eligible to appointment who is not a registered optometrist of the State of California and actually engaged in the practice of optometry at the time of such appointment. Each of the members shall hold office for a term of six years or until his successor is appointed and qualified and shall be so classified that one member of said board shall retire every two years. The present members of the California state board of examiners in optometry appointed under the provisions of the act in section number one hereof referred to, shall continue to serve and act as members of the state board of optometry, but under the provisions of this act during their respective terms or until their successors are appointed and qualified. No person shall be eligible to membership in the said state board of optometry who shall be a stockholder in, or owner of, or a member of the faculty of or of the board of trustees of any school of optometry or who shall be financially interested directly or indirectly in any concern manufacturing or dealing — optical supplies at wholesale. No member of the board shall be financially interested in any purchase or contract in which the board is interested. No member of the board shall be financially interested in the sale of any property or optical supplies to any prospective candidate for examination before the board.

Sec. 4. The powers and duties of the said state board of examiners in optometry shall be as follows:

12 1. To organize and elect from their members a president and secretary of said board who shall hold office for one year or until the election and qualification of a successor; to adopt and use a common seal, and establish a permanent office. The secretary of the said board before entering into the discharge of his duties shall execute a good and sufficient bond to the State of California in the sum of one thousand dollars conditioned for the faithful performance of his duties as such secretary. He shall receive all fees and moneys paid to the board; keep all the records of the board and discharge such other duties as the board shall from time to time prescribe.

2. To make all necessary disbursements to carry out the provisions of this act, but only upon the signature of the president and secretary of the said board and only from the state optometry fund, including payment for the bond of the secretary of said board; payment for stationery supplies; necessary optical instruments to be used in the conduct of examinations which shall be the property of the state; the printing and circulating to all optometrists in the state, once a year, a year-book containing the names and addresses of all optometrists in this state; a per diem of ten dollars for each member of the said board for each day actually spent in the performance of his duties as such, and mileage of five cents per mile for all distances necessarily traveled in going to and coming from the

meetings of said board, in full compensation for all services; per diems shall not exceed one for any calendar day and shall not exceed two in any one calendar month, except that in months when examinations are being held per diems may be allowed for not to exceed five days in any such month. Additional compensation may be allowed the secretary not to exceed fifty dollars per month.

13 3. To employ agents, attorneys and inspectors to secure evidence of, report on, and prosecute to conviction all violations of this act and to employ other necessary assistants in the carrying out of the provisions of this act. No state officer shall be eligible to employment by the board.

4. To hold regular meetings at least twice a year at which an examination of applicants for certificates of registration shall be held at such places as the board shall from time to time designate and special meetings upon request of a majority of the members of said board or upon the call of the president.

5. To keep an accurate record of all the proceedings of the board and of all its meetings, of all receipts and disbursements with vouchers for all disbursements, and of all prosecutions for violations of this act, and of all examinations held for applicants for certificates of registration with the names and addresses of all persons taking examinations and their success or failure to pass such examinations. To keep an accurate inventory of all property of the board and of the state in the possession of the board and to obtain a receipt therefor from its successor. All the records of the board shall be public and shall be kept in the office of the board.

6. To visit and examine schools wherein the science of optometry is taught in this state and accredit such schools as shall have been found by such board to give a sufficient course of study for the preparation of optometrists.

7. To keep a register of optometrists which shall contain the names and addresses of all persons to whom certificates of registration have been issued in the State of California and of all itinerant licenses together with the date of the issuance of such certificates and licenses and the place or places of business in which each optometrist is engaged, and all renewals, revocations and suspensions thereof.

8. To grant or refuse to grant certificates of registration as herein provided and to revoke the certificate of registration of any

14 optometrist for any of the causes specified in section eleven hereof. To issue annual licenses to itinerant optometrists on receipt of fifty dollars for each license.

9. To administer oaths and take testimony upon granting and revoking or suspending any certificate of registration.

10. To report to the governor annually on the first Monday in January in each year giving an accurate account of the work of the board during the preceding year with a statement of all moneys received and paid out pursuant to this act.

Sec. 5. Any person over the age of legal majority who shall have attended a reputable school of optometry for a period of not less than one year or who shall have engaged in the lawful practice of optometry in another state for a period of not less than three years may file

an application duly verified by his oath for an examination before said board with the secretary of said board at least two weeks prior to the date of examination setting forth the following:

(*a*) The name, age and address of the applicant.

(*b*) The name of the optometry school attended and for what period of time such school was attended by the applicant.

(*c*) The previous experience, if any, of the applicant in the practice of optometry, or in assisting in the practice of optometry.

(*d*) A statement of the previous examinations taken before the board and the dates of such examinations if any.

Such application shall be accompanied by an examination fee of twenty dollars and in case such applicant has attended a school of optometry and places his application upon that ground, such application shall also be accompanied by a certificate of a duly accredited school of optometry, acknowledged before an officer authorized to take acknowledgments showing the applicant to have successfully completed one year's work in such school and recommending such applicant for examination. In case the applicant fails to pass the examination a second examination may be made and examination taken without charge. For all subsequent examinations a fee of fiften dollars shall accompany each application to be returned in case of failure to pass.

Sec. 6. Examinations shall be held and given by the board two times a year at such time and place as the board may from time to time fix and designate at least one month prior to the date of such examination, provided, however, that one of such examinations shall be held in the city and county of San Francisco, and the other in the city of Los Angeles. At such examinations the board shall examine applicants in the anatomy of the eye, in normal and abnormal, refractive and accommodative and muscular conditions and coordination of the eye, in subjective and objective optometry, including the fitting of glasses, the principles of lens grinding and frame adjusting, and in such other subjects as may be deemed necessary by the said board to determine the applicant's qualification to practice optometry. All such applicants without discrimination, who shall satisfactorily pass such examination shall thereupon be registered in the board's register of optometrists and a certificate of registration shall be issued to them, under the seal and signature of the members of said board upon payment of a fee of five dollars. Such certificate shall continue in force until the first day of August next succeeding.

Sec. 7. Before engaging in the practice of optometry it shall be the duty of each registered optometrist to notify the board in writing of the place or places where he is to engage or intends to engage in the practice of optometry and of any changes in his place of business, and any notice required to be given by the board to any registered optometrist may be given by mailing to such address through the United States mail, post paid. Each registered optometrist shall annually on or before the first day of August of each year pay to the secretary of said board a fee of two dollars for a renewal of his registration certificate and shall keep such certificate conspicuously posted in his office or place of business at all times;

a period of thirty days' grace shall be allowed after the first of August, during which registration certificates may be renewed on payment of a fee of five dollars. Any registered optometrist who shall temporarily practice optometry outside or away from his regular registered place of business shall deliver to each customer or person there fitted or supplied with glasses a receipt which shall contain his signature and show his permanent registered place of business and the number of his certificate, together with a specification of the lenses furnished and the amount charged therefor.

Sec. 8. It shall be unlawful for any registered optometrist to practice optometry while traveling from place to place without having first obtained from the state board of optometry an itinerant optometrist's license and paid therefor the sum of fifty dollars in addition to his regular registration fee. Such intinerant optometrists shall deliver to each customer or person fitted or supplied with glasses a receipt which shall contain his signature and show his place of residence and the number of his certificate, together with a specification of the lenses furnished and the amount charged therefor.

Sec. 9. Any person who shall violate any of the provisions of this act shall be guilty of a misdemeanor and upon conviction
17 thereof shall be fined not less than fifty dollars nor more than two hundred and fifty dollars or by imprisonment for not less than one month or more than three months for the first offense and for the second offense by a fine of not less than two hundred and fifty dollars nor more than one thousand dollars or by imprisonment in the county jail for not less than six months nor more than one year. All fines and forfeitures collected or received for violations of or in prosecutions under this act shall be paid one-half to the state treasurer for the benefit of the state optometry fund without demand and one-half to the school fund of the city or country where the prosecution is had. In any prosecution for a violation of section one, hereof the use of test cards, test lenses, or of trial frames shall be prime facie evidence of the practice of optometry.

Sec. 10. The provision of this act shall not be construed to prevent duly licenses physicians and surgeons from treating the human eye nor to prohibit the sale of complete ready-to-wear eye glasses as merchandise from a permanent place of business in good faith and not in evasion of this act by the person not holding himself out as competent to examine and prescribe for the human eye.

Sec. 11. Any person registered as provided for in this act may have his certificate of registration revoked or suspended for a fixed period by the state board of optometry for any of the following causes.

1. His conviction of a felony or misdemeanor involving moral turpitude, in which case the record of conviction, or a certified copy thereof certified by the clerk of the Court, or by the judge in whose court the conviction is had, shall be conclusive evidence of such conviction.

18 2. When his certificate of registration has been secured by fraud or deceit practiced upon the board.

3. For unprofessional conduct, or for gross ignorance or ineffici-

ency in his profession. Unprofessional conduct shall mean employing what are known as "cappers" or "steers" to obtain business; the obtaining of any fee by fraud or misrepresentation; employing, directly or indirectly any suspended or unlicenses optician or optometrist to perform any work covered by this act; the advertising of optical business or treatment or advice in which untruthful, improbable, or impossible statements are made; or habitual intemperance, or gross immorality, or shall permit another to use his certificate.

4. Who shall send a solicitor from house to house or who shall solicit from house to house.

5. When the holder is suffering from a contagious or infectious disease.

6. For any violation of the provisions of this act.

Sec. 12. Before any certificate shall be revoked or suspended the holder thereof shall have notice in writing of the charge or charges against him and at a date specified in said notice at least five days after the service thereof, be given a public hearing and have an opportunity to produce testimony in his favor, and to confront the witness against him.

The revocation or suspension of any license revoked or suspended for any of the above causes except those specified in one and two of section eleven may be set aside upon appplication of the person whose license has been revoked at any time within six months from the date of such revocation upon proof being made to the satis-
19 faction of said board that the cause of said revocation no longer exists and that the applicant has been sufficiently punished. Before setting aside the revocation of any certificate the board may in *his* discretion require the applicant to pass the regular examination given for applicants for certificates of registration.

Sec. 13. It shall be the duty of the state treasurer to keep a separate account and fund to be known as the state optometry fund, which shall be disbursed only upon the signatures of the president and secretary of the said board, contersigned by the state controller except that the sum of three hundred dollars may each year be disbursed upon the signature of the president and secretary of said board alone for emergencies as an urgent contingent fund. All fees collected by the secretary of said board shall on the first day of each month be paid to the state treasury for the benefit of the state optometry fund.

Sec. 14. Any member of the board who shall appropriate, retain or use for his own private use any of the funds of the board shall be guilty of a felony.

Sec. 15. This act shall be known and may be cited as the optometry law."

Said Act was approved June 16th, 1913 and went into effect August 10, 1913."

VII.

Further complaining your orator avers that the said pretended optometry law is unconstitutional, null and void, because the same

is repugnant to the Fourteenth Amendment to the Constitution of the United States, and repugnant more particularly to that clause in said Amendment which provides that no State shall deprive
20 any person of his life, liberty or property without due process of law, and particularly to that clause of said Amendment which prohibits any State from denying to any persons within its jurisdiction the equal protection of the law.

VIII.

Orator further alleges and complains that she has been arbitrarily deprived of her rights to practice her said profession on the same terms and under like circumstances with others engaged in the same pursuit. That equal protection and security under the same pretended law is denied to the plaintiff in as much as said law is highly discriminatory in that Section 10 of said law expressly provides that it shall not be construed to prevent duly licensed physicians and surgeons from treating or fitting glasses to the human eye.

IX.

Orator further complains and alleges that the said Act is unconstitutional in that it appropriates to the sole use of the registered optometrist the right to employ any means other than the use of drugs in the measurement of the powers or range of human vision.

X.

Orator complains and alleges that under said pretended law the Legislature of the State of California has under the guise of a police regulation created a monopoly favored by law in relieving physicians and surgeons from the equal operation of the said law and allowing them to treat and fit glasses to the human eye without complying with the requirements of said optometry law.

21

XI.

Orator further complaining alleges that the said pretended law in denying to all other schools of scientific learning and practice the right to measure the range of human vision other than by the use of drugs on equal terms with the physician and surgeon is in violation of the constitutional guarantees under the Fourteenth Amendment to the Constitution of the United States, and is therefor- unconstitutional and void.

XII.

Orator further alleges that the practice of her profession as a- opthamologist is a lawful occupation, innocent in its nature neither hurtful to the individual or dangerous to the community at large, and the State of California did not have the power under the guise of a police regulation to impose discriminatory regulations upon complainant which unduly and unnecessarily interfere with the

liberty of complainant to pursue unmolested and unrestrained the practice of her said profession as an op-thalmologist.

XIII.

Complainant avers that this suit is authorized by law to be brought by her to redress her deprivation under the color of law and statute of a state, of the right, privileges and immunities secured her by the Constitution of the United States under Section 266 of the Judicial Code of the United States.

22 XIV.

Further complaining orator avers that she has no adequate remedy at law and can only have redress in a Court of equity where such matters are peculiarly cognizable.

XV.

Further complaining your orator avers that U. S. Webb, Attorney General of the State of California and the said Thomas Lee Woolwine, District Attorney of the County of Los Angeles, State of California, unless restrained from so doing by an order of this Court will institute proceedings in the Courts of the State of California to inforce said pretended law and severely punish anyone who shall measure the range of human vision or fit glasses to the human eye without first having obtained a certificate of registration from the board of optometry of the State of California, for the infraction thereof. That complainant is in every way qualified to practice her said profession as an op-thalmologist in the treatment of the inflammation of the eye and membranes, in the measurement of the range of human vision by mechanical appliances only and in the fitting of glasses to the human eye. That complainant has no certificate of registration from the said optometry board.

In consideration whereof, and for as much as the said law is unconstitutional and void in so far as it effects your complainant in the right to practice said profession as an op-thalmologist, orator prays:

First. That the aforesaid statute of the State of California enacted as aforesaid and hereinbefore fully set out in so far as it
23 effects the complainant in the pursuit of her said profession as an op-thalmologist be declared to be in violation of and in contravention of the rights of this *defendant* under the Fourteenth Amendment of the Constitution of the United States.

Second. That the said U. S. Webb, Attorney General of the State of California, and the said Thomas Lee Woolwine, District attorney of the County of Los Angeles, State of California, and each of their successors, assistants, deputies, agents and employees be temporarily and permanently enjoined from in any way or manner enforcing against your complainant or attempting to enforce the provisions of the aforesaid unconstitutional and void statute, and for instituting or causing to be instituted any suit, prosecution or proceedings

to enforce against said complainant the provisions of the said law.

Third. That a temporary restraining order be granted before the hearing and determination of the application herein, for an interlocutory injunction because of the facts as alleged herein, that irreparable loss and damage will result to this complainant unless such temporary restraining order be granted.

Fourth. That claimant have such other and further relief as is just and equitable as well as a decree for costs.

Fifth. And may it please your Honor to grant unto complainant a Writ of Subpœna of the United States of America issued out of and under the seal of this Honorable Court directed to the said Hiram W. Johnson, Governor of the State of California, U. S. Webb,
Attorney General of the State of California, and Thomas Lee
24 Woolwine, District Attorney of the County of Los Angeles,
therein to be named and under a certain penalty to be and appear before this Honorable Court then and there to answer, but not under oath (the answer under oath being expressly waived) all and singular the premises and to stand to, perform and abide by such order, direction and decree as may be made against them in the premises, and the complainant will ever pray, et cetera.

TOM L. JOHNSTON,
Solicitor for Complainant.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

I, Kate P. McNaughton, upon oath say: I am the complainant in the above entitled Bill and am familiar with the matters and things mentioned in said Bill which I have read; I know the contents thereof and the same are true of my *known* knowledge except as to those matters therein stated to be true on information and belief, and as to those matters I believe them to be true.

KATE P. McNAUGHTON.

Subscribed and sworn to before me this, the 7th day of March, 1916.

[SEAL.] CHAS. E. STANTON.
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires November 24, 1916.

25 (Endorsed:) No. C. 19 Eq. United States District Court, Southern District of California, Southern Division. Kate P. McNaughton, Plaintiff, vs. Hiram W. Johnson, et al., Defendants. Bill of Complaint. Filed Mar. 7, 1916. Wm. M. Van Dyke, Clerk, by Chas. N. Williams, Deputy Clerk.

26 In the District Court of the United States in and for the Southern District of California, Southern Division.

KATE P. MCNAUGHTON, Plaintiff,

vs.

HIRAM W. JOHNSON, Governor of the State of California; U. S. Webb, Attorney General of the State of California, and Thomas Lee Woolwine, District Attorney of the County of Los Angeles, California, Defendants.

Affidavit.

STATE OF CALIFORNIA,
County of Sacramento, ss:

T. B. Hagerty being first duly sworn, deposes and says: that he is a resident of the City of Sacramento, County of Sacramento, State of California; that he is over the age of 21 years, and is not interested in the subject matter of the above entitled action, or connected with any of the parties thereto; that on the 8th day of March, 1916, he served upon the Honorable Hiram W. Johnson, Governor of the State of California, in the City of Sacramento, a notice, a copy of which notice is hereto attached and made a part of this affidavit; and that at the time of the said service of said notice, he also served upon the Honorable Hiram W. John-
27 son, Governor of the State of California, in the City of Sacramento, a copy of the Bill of Complaint herein.

T. B. HAGERTY.

Subscribed and sworn to before me this 8th day of March, 1916.

[SEAL.] ALBERT D. SMITH,
Notary Public in and for the County of Sacramento of California.

My Commission expires Mch. 23, 1918.

28 In the District Court of the United States in and for the Southern District of California, Southern Division.

In Equity.

KATE P. MCNAUGHTON, Plaintiff,

vs.

HIRAM W. JOHNSON, Governor of the State of California; U. S. Webb, Attorney General of the State of California, and Thomas Lee Woolwine, District Attorney of the County of Los Angeles, California, Defendants.

Notice.

To Hiram W. Johnson, Governor of the State of California; U. S. Webb, Attorney General of the State of California; Thomas Lee Woolwine, District Attorney of the County of Los Angeles, State of California:

You and each of you will take notice that the plaintiff herein by her attorney, will make application to the Honorable Judges of the District Court of the United States, in and for the Southern District of California, Southern Division, sitting at Los Angeles, California, on the 30th day of March, 1916, at the Federal Court House, in the City of Los Angeles, in the State of California, at ten o'clock A. M., on said day, for an interlocutory injunction
29 herein restraining the defendants above named and each of them, from in any manner inforcing or attempting to inforce the provisions of a certain Act passed by the Legislature of the State of California, at its Fortieth Session, which began on Monday, January 6th, 1913, and which adjourned on Tuesday, May 12th, 1913, and which said Act was approved by the Governor June 16th, 1913, and went into effect August 10th, 1913, and designated as Chapter 598 of the Statutes and Amendments to the Code of California, and known as the optometry law, in so far as the said law affects the right of complainant to pursue her profession as an op-thalmologist, according to the Bill of Complaint filed herein, a copy of which is herewith served upon you.

And that at the same time and place and pending the hearing and determination of said application for an interlocutory injunction, the plaintiff will ask that a temporary restraining order issue herein under the provisions of Section 266 of the Judicial Code of the United States.

Dated at Los Angeles, California, this, the 7th day of March, 1916.

TOM L. JOHNSTON,
Solicitor for Plaintiff.

(Endorsed:) No. C. 19. Eq. United States District Court, Southern District of California, Southern Division. Kate P. McNaughton, Plaintiff, vs. Hiram W. Johnson, et al., Defendants.

Affidavit of Service of Notice and Copy of Bill of Complaint. Filed Mar. 16, 1916. Wm. M. Van Dyke, Clerk, by R. S. Zimmerman, Deputy Clerk.

30 In the District Court of the United States in and for the Southern District of California, Southern Division.

KATE P. MCNAUGHTON, Plaintiff,

vs.

HIRAM W. JOHNSON, Governor of the State of California; U. S. Webb, Attorney General of the State of California, and Thomas Lee Woolwine, District Attorney of Los Angeles County, California, Defendants.

Affidavit.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Vincent S. Brown being first duly sworn, deposes and says: that he is a resident of the City and County of San Francisco, State of California; that he is over the age of 21 years, and is not interested in the subject matter of the above entitled action, or connected with any of the parties thereto; that on the 9th day of March, 1916, he served upon the Honorable U. S. Webb, Attorney General of the State of California, in the City and County of San Francisco, a notice, a copy of which is hereto attached and made a part of this affidavit, and that at the time of the said service of said notice, he also served upon the Honorable U. S. Well, Attorney General of the State of California, in the City and County of San Francisco, a copy of the bill of Complaint herein.

VINCENT S. BROWN.

31 Subscribed and sworn to before me this 9 day of March, 1916.

EDITH W. BURNHAM,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires: January 30, 1918.

32 In the District Court of the United States in and for the Southern District of California, Southern Division.

In Equity.

KATE P. MCNAUGHTON, Plaintiff,

vs.

HIRAM W. JOHNSON, Governor of the State of California; U. S. Webb, Attorney General of the State of California, and Thomas Lee Woolwine, District Attorney of the County of Los Angeles, California, Defendants.

Notice.

To Hiram W. Johnson, Governor of the State of California; U. S. Webb, Attorney General of the State of California; Thomas Lee Woolwine, District Attorney of the County of Los Angeles, State of California:

You and each of you will take notice that the plaintiff herein by her attorney, will make application to the Honorable Judges of the District Court of the United States, in and for the Southern District of California, Southern Division, sitting at Los Angeles, California, on the 30th day of March, 1916, at the Federal Court House in the City of Los Angeles, in the State of California, at ten o'clock A. M., on said day, for an interlocutory injunction herein restraining the defendants above named and each of them, from in any manner inforcing or attempting to inforce the provisions of a certain Act passed by the Legislature of the State of Califor-
33 nia at its Fortieth Session, which began on Monday, January 6th, 1913, and which adjourned on Tuesday, May 12th, 1913, and which said Act was approved by the Governor June 16th, 1913, and went into effect August 10th, 1913, and designated as Chapter 598 of the Statutes and Amendments to the Code of California, and known as the optometry law, in so far as the said law affects the right of complainant to pursue her profession as an opthalmologist, according to the Bill of Complaint filed herein, a copy of which is herewith served upon you.

And that at the same time and place and pending the hearing and determination of said application for an interlocutory injunction, the plaintiff will ask that a temporary restraining order issue herein under the provisions of Section 266 of the Judicial Code of the United States.

Dated at Los Angeles, California, this, the 7th day of March, 1916.

TOM L. JOHNSTON,
Solicitor for Plaintiff.

(Endorsed:) No. C. 19. Eq. United States District Court, Southern District of California, Southern Division. Kate P. McNaughton, Plaintiff, vs. Hiram W. Johnson, et al., Defendants. Af-

fidavit of Service of Notice and Copy of Bill of Complaint. Filed Mar. 16, 1916. Wm. M. Van Dyke, Clerk, by R. S. Zimmerman, Deputy Clerk.

34 In the District Court of the United States in and for the Southern District of California, Southern Division.

KATE P. MCNAUGHTON, Plaintiff,
vs.
HIRAM W. JOHNSON, Governor of the State of California; U. S. Webb, Attorney General of the State of California, and Thomas Lee Woolwine, District Attorney of Los Angeles County, California, Defendants.

Affidavit.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

A. S. Adams being first duly sworn, deposes and says: that he is a resident of the City of Los Angeles, County of Los Angeles, State of California; that he is over the age of 21 years, and is not interested in the subject matter of the above entitled action, or connected with any of the parties thereto; that on the 13th day of March, 1916, he served upon the Honorable Thomas Lee Woolwine, District Attorney of Los Angeles County, California, in the City of Los Angeles, a notice, a copy of which notice is hereto attached and made a part of this affidavit; and that at the time of the said service of said notice, he also served upon the Honorable Thomas Lee Woolwine, District Attorney of Los Angeles County, California, in the City of Los Angeles, a copy of the Bill of Complaint herein.

35

A. S. ADAMS.

Subscribed and sworn to before me this 15th day of March, 1916.

[SEAL] FREDERICK W. SMITH,
Notary Public in and for the County of Los Angeles, State of California.

My commission expires December 7, 1918.

36 In the District Court of the United States in and for the Southern District of California, Southern Division.

In Equity.

KATE P. MCNAUGHTON, Plaintiff,

vs.

HIRAM W. JOHNSON, Governor of the State of California; U S. Webb, Attorney General of the State of California, and Thomas Lee Woolwine, District Attorney of the County of Los Angeles, California, Defendants.

Notice.

To Hiram W. Johnson, Governor of the State of California; U. S. Webb, Attorney General of the State of California; Thomas Lee Woolwine, District Attorney of the County of Los Angeles, State of California:

You and each of you will take notice that the plaintiff herein by her attorney, will make application to the Honorable Judges of the District Court of the United States, in and for the Southern District of California, Southern Division, sitting at Los Angeles, California, on the 30th day of March, 1916, at the Federal Court House, in the City of Los Angeles, in the State of California, at ten o'clock, A. M., on said day, for an interlocutory injunction herein restrain-
37 ing the defendants above named and each of them, from in any manner inforcing or attempting to inforce the provisions of a certain Act passed by the Legislature of the State of California, at its Fortieth Session, which began on Monday, January 6th, 1913, and which adjourned on Tuesday, May 12th, 1913, and which said Act was approved by the Governor June 16th, 1913, and went into effect August 10th, 1913, and designated as Chapter 598 of the Statutes and Amendments to the Code of California, and known as the optometry law, in so far as the said law affects the right of complainant to pursue her profession as an op-thalmologist, according to the Bill of Complaint filed herein, a copy of which is herewith served upon you.

And that at the same time and place and pending the hearing and determination of said application for an interlocutory injunction, the plaintiff will ask that a temporary restraining order issue herein under the provisions of Section 266 of the Judicial Code of the United States.

Dated at Los Angeles, California, this, the 7th day of March, 1916.

TOM L. JOHNSTON,
Solicitor for Plaintiff.

(Endorsed:) No. C. 19. Eq. United States District Court, Southern District of California, Southern Division. Kate P. McNaughton, Plaintiff, vs. Hiram W. Johnson, et al., Defendants. Affidavit of Service of Notice and Copy of Bill of Complaint. Filed Mar. 16, 1916. Wm. M. Van Dyke, Clerk, by R. S. Zimmerman, Deputy Clerk.

38 At a stated term, to-wit, the January Term, A. D. 1916, of the District Court of the United States of America in and for the Southern District of California, Southern Division, Held at the Court-room thereof, in the City of Los Angeles, on Saturday, the Eighth Day of April, in the Year of Our Lord one Thousand Nine Hundred and Sixteen.

Present: The Honorable Erskine M. Ross, Circuit Judge; The Honorable Oscar A. Trippet, District Judge, and The Honorable Edward E. Cushman, District Judge.

No. C-19. Equity.

KATE MCNAUGHTON, Complainant,
vs.
HIRAM W. JOHNSON, Governor of the State of California, et al., Defendants.

Tom L. Johnston, Esq., appearing as counsel for complainant; Robert M. Clarke, Esq., Assistant to the Attorney General of the State of California, and George E. Cryer, Esq., Assistant District Attorney of the County of Los Angeles, California, appearing as counsel for defendants; this cause having heretofore been submitted to the court for its consideration and decision on a question as to the jurisdiction of this court herein; the court, having duly considered the same and being fully advised in the premises, now hand down their memorandum opinion thereon; and it is ordered that the challenge of the jurisdiction of this court in this suit be, and the same hereby is denied; and this cause thereupon coming on to be heard on complainant's motion for an interlocutory injunction; and said motion having been argued, in support thereof, by Tom L. Johnston, Esq., of counsel for complainant; it is thereupon by the court ordered that complainant's motion for an interlocutory injunction be, and the same hereby is denied.

39 In the District Court of the United States in and for the Southern District of California, Southern Division.

C-18. In Equity.

P. L. CRANE, Plaintiff,

vs.

HIRAM W. JOHNSON, Governor of the State of California; U. S. Webb, Attorney General of the State of California, and Thomas Lee Woolwine, District Attorney of the County of Los Angeles, California, Defendants.

C-19. In Equity.

KATE P. MCNAUGHTON, Plaintiff,

vs.

HIRAM W. JOHNSON, Governor of the State of California; U. S. Webb, Attorney General of the State of California, and Thomas Lee Woolwine, District Attorney of the County of Los Angeles, California, Defendants.

Before Ross, Circuit Judge, and Trippet and Cushman, District Judges.

40 Upon the authority of the cases of William Truax, Sr., and others, against Mike Raich, (Advance Sheets Supreme Court, Nov. 1, 1915), and Raich v. Truax, 219 Fed. 273, 283, we think the jurisdiction of the District Court over the present suits is clear. We have, therefore, only to determine whether upon the bill the complainant is entitled to an interlocutory injunction.

The rule is well settled that the granting of such orders is within the sound discretion of the court, and in the exercise of such discretion, based upon the averments of the bills, we are of the opion that the application should be denied. We do not understand that upon such an application as the present the court, composed, under statutory requirement, of the Judge of the District Court, of another District Judge and a Circuit Judge, is called upon, if, indeed, authorized, to decide the merits of the suits.

(Endorsed:) No. C.-18-C-19-Eq.-U. S. District Court, Southern District of California, Southern Division. P. L. Crane vs. Hiram Johnson, et al. Kate P. McNaughton vs. Hiram Johnson, et al. Memo. of Opinion of Court. Filed Apr. 8, 1916. Wm. M. Van Dyke, Clerk, by T. F. Green, Deputy Clerk.

41 In the District Court of the United States in and for the Southern District of California, Southern Division.

C-19. Equity.

KATE P. McNAUGHTON, Plaintiff,

vs.

HIRAM W. JOHNSON, Governor of the State of California; U. S. Webb, Attorney General of the State of California, and Thomas Lee Woolwine, District Attorney of Los Angeles County, California, Defendants.

Petition for Appeal.

To the Honorable Oscar A. Trippet, Judge of the United States District Court in and for the Southern District of California, Southern Division:

The above named plaintiff, feeling aggrieved by the order rendered and entered in the above entitled cause on the 8th day of April, 1916, refusing plaintiff's application for an interlocutory injunction, appeals therefrom to the Supreme Court of the United States, for the reasons set forth in the assignment of errors filed herewith. Plaintiff prays that this appeal be allowed and that citation be issued as provided by law, and that the transcript of the record, proceedings, and documents upon which said order was based, duly authenticated be sent to the Supreme Court of the United States, sitting at Washington, in the District of Columbia, under the rules of that Court in such cases made and provided.

TOM L. JOHNSTON,
Attorney for Complainant.

42 (Endorsed:) No. C-19. Equity. United States District Court, Southern District of California, Southern Division. Kate P. McNaughton, Plaintiff, vs. Hiram W. Johnson, et al., Defendants. Petition for Appeal. Received copy of within petition this 10 day of April, 1916. U. S. Webb, Robt. M. Clarke, Thomas Lee Woolwine, Geo. E. Cryer. Tom L. Johnston, Esq., Attorney for Plaintiff. Filed Apr. 12, 1916. Wm. M. Van Dyke, Clerk, by T. F. Green, Deputy Clerk.

43 In the District Court of the United States in and for the Southern District of California, Southern Division.

C-19. Equity.

KATE P. MCNAUGHTON, Plaintiff,

vs.

HIRAM W. JOHNSON, Governor of the State of California; U. S. Webb, Attorney General of the State of California, and Thomas Lee Woolwine, District Attorney of Los Angeles County, California, Defendants.

Assignment of Errors.

Now comes Kate P. McNaughton, by her attorney, Tom L. Johnston, complainant herein, and makes and files the following assignment of errors upon her appeal to the Supreme Court of the United States from an order of the District Court in and for the Southern District of California, Southern Division, denying plaintiff's application for an interlocutory injunction.

The District Court erred in denying the order for the interlocutory injunction in this case for the following reasons, to-wit:

I.

That plaintiff's Bill of Complaint filed in the above entitled cause, showed sufficient grounds for the granting of an interlocutory injunction.

44 II.

That it appears from the face of plaintiff's Bill of Complaint that the plaintiff is entitled to an interlocutory injunction to restrain the inforcement of the Statute of the State of California, which denies to the plaintiff the equal protection of the law, and which is in controvention of her rights guaranteed her under the Fourteenth Amendment of the Constitution of the United States.

Wherefore, plaintiff prays that said order be reversed and the District Court in and for the Southern District of California, Southern Division, be ordered to enter an order granting plaintiff's application for an interlocutory injunction.

TOM L. JOHNSTON,
Solicitor for Complainant.

(Endorsed:) No. C-19. Equity. United States District Court, Southern District of California, Southern Division. Kate P. McNaughton, Plaintiff, vs. Hiram W. Johnson, et al., Defendants. Assignment of Errors. Received copy of within Assignment this 10 day of April, 1916. U. S. Webb, Rob't M. Clarke, Thomas Lee Woolwine, Geo. E. Cryer. Tom L. Johnston, Esq., Attorney for Plaintiff. Filed Apr. 12, 1916. Wm. M. Van Dyke, Clerk, by T. F. Green, Deputy Clerk.

45 In the District Court of the United States in and for the Southern District of California, Southern Division.

C-19. Equity.

KATE P. McNAUGHTON, Plaintiff,

vs.

HIRAM W. JOHNSON, Governor of the State of California; U. S. Webb, Attorney General of the State of California, and Thomas Lee Woolwine, District Attorney of Los Angeles County, California, Defendants.

Order Allowing Appeal and Fixing Bond.

The above named complainant having petitioned this Court for an appeal from the order and decree made in this cause on the 8th day of April, 1916, denying the application of plaintiff for an interlocutory injunction, the Court hereby grants the said appeal from said judgment and it is hereby ordered that the said appeal be granted upon the giving of a good and sufficient bond in the sum of Three Hundred Dollars, to be approved by this Court for the payment of costs.

Done in open Court, this 12th day of April, 1916.

OSCAR A. TRIPPET,
Judge of the District Court of the United States in and for the Southern District of California, Southern Division.

46 (Endorsed:) No. C-19. Equity. United States District Court, Southern District of California, Southern Division. Kate P. McNaughton, Plaintiff vs. Hiram W. Johnson, et al., Defendants. Order Allowing Appeal and Fixing Bond. Received copy of within this 11 day of April, 1916. U. S. Webb, Att'y Gen.; Robert M. Clarke, Deputy, Attorneys for Defendants. Thomas Lee Woolwine, Geo. E. Cryer. Tom L. Johnston, Esq., Attorney for Plaintiff. Filed Apr. 12, 1916. Wm. M. Van Dyke, Clerk, by T. F. Green, Deputy Clerk.

47 In the District Court of the United States in and for the Southern District of California, Southern Division.

C-19. Equity.

KATE P. McNAUGHTON, Plaintiff,

vs.

HIRAM W. JOHNSON, Governor of the State of California; U. S. Webb, Attorney General of the State of California; Thomas Lee Woolwine, District Attorney of the County of Los Angeles, State of California, Defendant.

Bond on Appeal.

Know all men by these presents, That we, Kate L. McNaughton, the Complainant and Rollo E. Goodrich of Los Angeles, State of California, and Samuel W. Thomas of Los Angeles, State of California, as sureties, are held and firmly bound unto the above named Hiram Johnson, Governor of the State of California, U. S. Webb, Attorney General of the State of California, and Thomas Lee Woolwine, District Attorney in and — the County of Los Angeles, State of California, in the penal sum of three hundred dollars ($300.00) to be paid to the said parties, for the payment of which well and truly to be made, we bind ourselves, or each of us, our and each of our heirs, executors, administrators and successors jointly and severally, firmly by these presents.

Sealed with our seals and dated this 11th day of April, in the year of our Lord, one thousand nine hundred and sixteen.

48 Whereas, the above named Kate P. McNaughton has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above entitled suit by the District Court of the United States for the Southern District of California, Southern Division.

by the District Court of the United States for the Southern District of California, Southern Division.

Now, therefore, the condition of this obligation is such that if the above named *P. L. Crane* shall prosecute said appeal to effect and answer all damages and costs, if he shall fail to make said appeal good, then this obligation shall be void, otherwise the same shall remain in full force and virtue.

KATE P. McNAUGHTON.
ROLLO E. GOODRICH.
SAMUEL W. THOMAS.

Sealed and delivered, and taken and acknowledged, this the 11th day of April, 1916, before me, Arthur L. Falloon, a Notary Public in and for the County of Los Angeles, State of California.

[SEAL.] ARTHUR L. FALLOON,
Notary Public in and for the County of Los Angeles, State of California.

The foregoing bond is approved this 12th day of April, 1916.

OSCAR A. TRIPPET,
District Judge.

49 (Endorsed:) No. C-19. Equity. United States District Court, Southern District of California, Southern Division. Kate P. McNaughton, Plaintiff, vs. Hiram W. Johnson, et al., Defendant. Bond on Appeal. Received copy of within this 11th day of April 1916. U. S. Webb, Attorney General; Robert M. Clarke, Deputy, Attorneys for Defendants. Thomas Lee Woolwine, Geo. C. Cryer. Filed Apr. 12, 1916. Wm. M. Van Dyke, Clerk, by T. F. Green, Deputy Clerk.

50 In the District Court of the United States in and for the Southern District of California, Southern Division.

C-19. Equity.

KATE P. MCNAUGHTON, Plaintiff,
vs.
HIRAM W. JOHNSON, Governor of the State of California; U. S. Webb, Attorney General of the State of California, and Thomas Lee Woolwine, District Attorney of Los Angeles County, California, Defendants.

Order for Clerk to Certify Papers, Documents, et cetera, to the Supreme Court of the United States.

Plaintiff having made application for an appeal to the Supreme Court of the United States from the order of this Court denying plaintiff's application for an interlocutory injunction and said appeal having been duly allowed by order of this Court, now, on motion of Tom L. Johnston, Attorney for the Complainant herein,

It is ordered, that the Clerk prepare and certify a transcript of the record in this case upon plaintiff's said appeal, and forward the same to the Clerk of the Supreme Court of the United States.

Dated this, the 10th day of April, 1916.

OSCAR A. TRIPPET,
Judge of the District Court.

51 (Endorsed:) No. C-19-Equity. United States District Court, Southern District of California, Southern Division. Kate P. McNaughton, Plaintiff, vs. Hiram W. Johnson, et al., Defendants. Order for Clerk to Certify Papers, Documents, et cetera, to the Supreme Court of the United States. Received copy of the within Order this 10th day of April, 1916. U. S. Webb, Rob't M. Clarke, Thomas Lee Woolwine, Dis't Att'y; Geo. E. Cryer, Ch. Dep. Tom L. Johnston, Esq., Attorney for Plaintiff. Filed Apr. 12, 1916. Wm. M. Van Dyke, Clerk, by T. F. Green, Deputy Clerk.

52 In the District Court of the United States in and for the Southern District of California, Southern Division.

C-19. Equity.

KATE P. MCNAUGHTON, Plaintiff,

vs.

HIRAM W. JOHNSON, Governor of the State of California; U. S. Webb, Attorney General of the State of California, and Thomas Lee Woolwine, District Attorney of Los Angeles County, California, Defendants.

Præcipe for Transcript of Record on Appeal.

To William Van Dyke, Esquire, Clerk of the United States District Court in and for the Southern District of California, Southern Division:

You will please, in accordance with the order and citation in the above entitled cause, prepare a transcript of the record in this cause to be filed in the office of the Clerk of the Supreme Court of the United States, and include in said transcript on appeal the following pleadings, proceedings and papers on file, to-wit:

Bill of Complaint;

Opinion of Court denying application for interlocutory injunction;

Petition for Appeal;

Order allowing Appeal;

53 Assignment of Errors;

Citation on Appeal and Clerk's certificate;

Notice of Application for Temporary Restraining Order; and Interlocutory Injunction;

Order Denying Interlocutory Injunction;

Præcipe for Transcript of Record on Appeal;

Order to Certify Transcript of Record;

Affidavit of Service of Assignment of Errors and Citation on Appeal.

Dated this, the 10th day of April, 1916.

TOM L. JOHNSTON,
Solicitor for Complainant.

(Endorsed:) No. c-19-Equity. United States District Court, Southern District of California, Southern Division. Kate P. McNaughton, Plaintiff, vs. Hiram W. Johnson, et al., Defendants. Præcipe for Transcript of Record on Appeal. Received copy of within Præcipe this 10th day of April, 1916. U. S. Webb, Rob't M. Clarke. Thomas Lee Woolwine, Dist. Att'y. Geo. E. Cryer. Tom. L. Johnston, Esq., Attorney for Plaintiff. Filed Apr. 12, 1916. Wm. M. Van Dyke, Clerk, by T. F. Green, Deputy Clerk.

54 In the District Court of the United States in and for the Southern District of California, Southern Division.

No. C-19. Equity.

KATE P. McNAUGHTON, Complainant,

vs.

HIRAM W. JOHNSON, Governor of the State of California; U. S. Webb, Attorney General of the State of California, and Thomas Lee Woolwine, District Attorney of Los Angeles County, California, Defendants.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing fifty-three (53) typewritten pages, numbered from 1 to 53, inclusive, and comprised in one (1) volume, to be a full, true and correct copy of the Bill of Complaint, Notices of Application for Interlocutory Injunction, with Affidavits showing service on each of the Defendants, Minute Order Denying Application for Interlocutory Injunction, Memorandum Opinion of Court Denying Application for Interlocutory Injunction, Petition for Order Allowing Appeal, Assignment of Errors, Order Allowing Appeal and Fixing Bond, Bond on Appeal, Order for Clerk to Certify Papers, Documents, etc., to the Supreme Court of the United States, and Præcipe for Transcript of Record on Appeal, in the above and therein-entitled action, and that the same together constitute the record on appeal, as specified in the said Præcipe for Transcript of Record on Appeal, filed in my office on behalf of the appellant by her attorney of record.

55 I do further certify that the cost of the foregoing transcript is $22.50, the amount whereof has been paid me by Kate P. McNaughton, the Appellant herein.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court of the United States of America, in and for the Southern District of California, Southern Division, this 25th day of April, in the year of our Lord one thousand nine hundred and sixteen, and of our Independence the one hundred and fortieth.

[Seal of the U. S. District Court, Southern Dist. of California.]

WM. M. VAN DYKE,
Clerk of the District Court of the United States of America in and for the Southern District of California,
By LESLIE S. COLYER,
Deputy Clerk.

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled 4/25/16. L. S. C.]

Endorsed on cover: File No. 25,315. S. California D. C. U. S. Term No. 1032. Kate P. McNaughton, appellant, vs. Hiram W. Johnson, Governor of the State of California, et al. Filed May 26th, 1916. File No. 25,315.

In the Supreme Court
OF THE
United States.

Kate P. McNaughton,
Appellant,

vs.

Hiram W. Johnson, Governor of the State of California, U. S. Webb, Attorney General of the State of California, and Thomas Lee Woolwine, District Attorney of the County of Los Angeles, State of California,
Appellees.

Stipulation and Agreement to Advance.

It is hereby stipulated and agreed by counsel for the respective parties hereto that notice of motion to advance the above-entitled cause is hereby waived and that the court may advance the above-entitled cause for hearing at the earliest day convenient to the court during the October term, 1916.

Dated this 20th day of June, A. D. 1916.

Tom L. Johnston
.....
Attorney for Appellant.

.....
U. S. WEBB
ROBERT M. CLARKE
THOMAS LEE WOOLWINE
GEORGE E. CRYER
CHIEF DEPUTY
.....
Attorneys for Appellees.

In the Supreme Court
OF THE
United States.

Kate P. McNaughton,
Appellant,
vs.
Hiram W. Johnson, Governor of the State of California, U. S. Webb, Attorney General of the State of California, and Thomas Lee Woolwine, District Attorney of the County of Los Angeles, State of California,
Appellees.

Motion by Appellant to Advance.

Comes now the appellant in the above-entitled cause, the appellees consenting, as evidenced by stipulation of counsel dated the 20th day of June, A. D. 1916, signed and filed herewith, and moves the court to advance the above-entitled cause for hearing to an early day convenient to the court during the October term, 1916, the reasons prompting this motion are as follows:

The above-entitled cause involves the constitutionality of an act of the legislature of the state of California, known as the Optometry

Law, and this suit was brought by the appellant herein under section 266 of the Judicial Code of the United States, which provides that cases brought under this section shall take precedence over all other business, and the hearing of same shall be in every way expedited.

Wherefore, it is prayed that this application to advance the above-entitled cause for hearing at an early date convenient to the court during the October term, 1916, be allowed.

Respectfully submitted,

Thos. L. Johnston

Counsel for Appellant.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1916.

No. 35345. No. 484

Kate P. McNaughton,

Appellant,

vs.

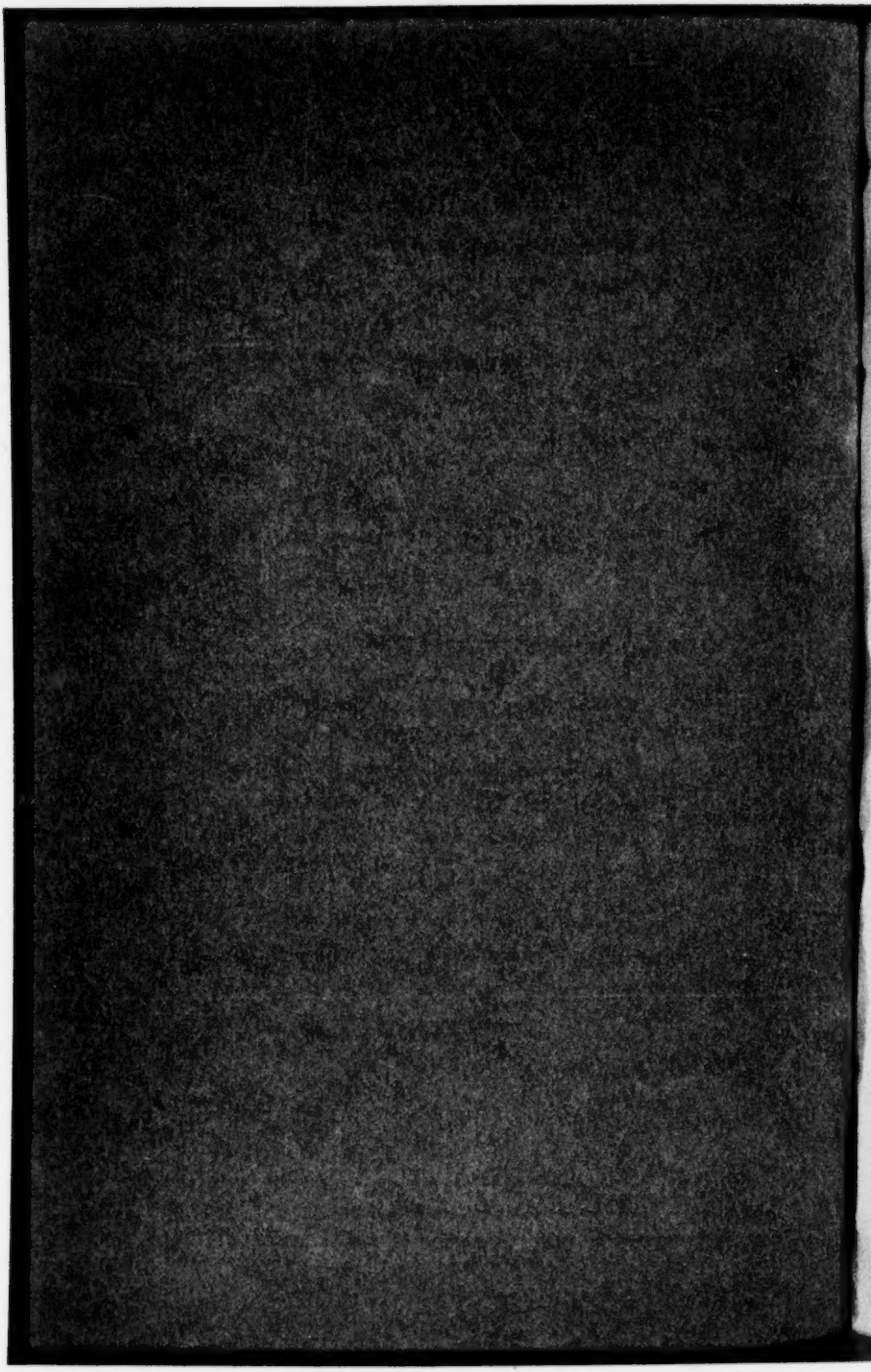
Hiram W. Johnson, Governor of the State of California, U. S. Webb, Attorney General of the State of California, and Thomas Lee Woolwine, District Attorney of the County of Los Angeles, State of California,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

APPELLANT'S BRIEF.

TOM L. JOHNSON,
Counsel for Appellant.



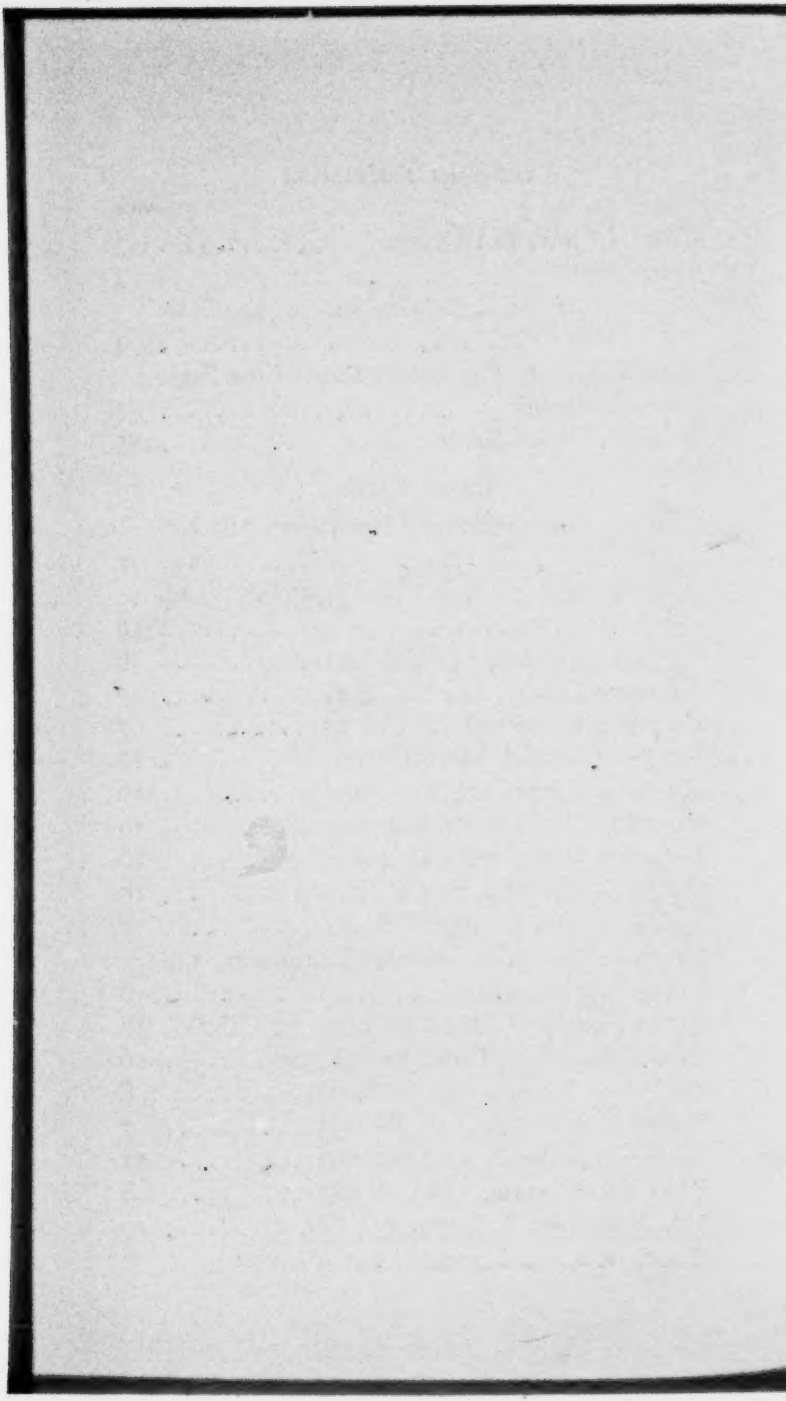
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IN THE

SUPREME COURT

OF THE

UNITED STATES.

Kate P. McNaughton,
Appellant,

vs.

Hiram W. Johnson, Governor of the State of California, U. S. Webb, Attorney General of the State of California, and Thomas Lee Woolwine, District Attorney of the County of Los Angeles, State of California,
Appellees.

APPELLANT'S BRIEF.

This is an appeal from an order denying an application for an interlocutory injunction seeking to restrain the attorney general of the state of California and the district attorney of the county of Los Angeles, California, from enforcing the provisions of the law enacted by the legislature of the state of California, and known as the Optometry Law of the state of California, and fully set forth in the original bill of complaint herein. Said application was made under the provisions of section 266 of the Judicial Code of the United States and heard before Erskine M. Ross, circuit judge of the United States, O. A. Trippet and E. E. Cushman, district judges of the United States.

The act of the legislature of the state of California known as the Optometry Law, com-

plained of by the appellant herein as being in contravention of her rights under the Fourteenth Amendment of the Constitution of the United States, is fully set forth in plaintiff's original bill of complaint filed herein.

Section 1 of said act provides:

> "It shall be unlawful for any person to engage in the practice of optometry without first having obtained a certificate of registration from the State Board of Optometry."

Section 2 of said act provides:

> "That the practice of optometry is hereby defined to be the employment of any means other than the use of drugs for the measurement of the powers or range of human vision, or the determination of the accommodative and refractive states of the human eye or the scope of its function in general, or the adaptation of lenses or frames for the aid thereof."

Section 10 of said act is as follows:

> "The provisions of this act shall not be construed to prevent any licensed physicians and surgeons from treating the human eye or fitting glasses to the human eye, and section 2 of said act expressly relieves from the operation of said law all those who use drugs, for the measurement of the powers or range of human vision, or in determining the accommodative and refractive state of the human eye."

It is the contention of plaintiff that by reason of the fact that the law specially exempts from its operation all those practitioners who employ drugs in measuring the range of human vision, discriminates against all those who employ any other means than the use of drugs, and that the act is, therefore, special and discriminatory and

creates a monopoly favored and protected by law, in the interest of practitioners who employ drugs in determining the accommodative and refractive state of the human eye in contravention of the rights of the complainant under the Fourteenth Amendment of the Constitution of the United States.

That said pretended law under the guise of a police regulation is in fact not a *bona fide* exercise of the reasonable discretion of the legislative department of the state, in the interest of public health and welfare, but that it creates a monopoly favored by law in the protection of those who employ drugs in the measurement of the range of human vision and in determining the accommodative and refractive states of the human eye. The mere assertion by the legislature that a statute relates to the public health, safety or welfare does not in itself bring that statute within the police power of the state, for there must be some apparent danger to the public and the regulations must be the means of eradicating the evil or avoiding the danger and there must be some obvious and real connection between the actual provisions of the police regulation and its avowed purpose.

This police regulation to be valid must be not only reasonable but in fact adapted to the protection of the public health and welfare.

Can it be successfully contended that the act

in question under the guise of a police regulation is in fact and in good faith a proper exercise of the police power when it imposes restrictions only on that class of practitioners who employ the mechanical and harmless method in measuring the range of human vision and relieves from the operation of the law that class of practitioners who employ drugs in measuring the range of human vision and in determining the accommodative and refractive states of the human eye? The use of drugs being the only really dangerous practice demanding in the interest of the public protection by police regulation, we insist that the act in question discriminates against the plaintiff herein and arbitrarily deprives her of her rights to pursue her profession as a doctor of opthalmology in measuring the range of the human eye and in adapting suitable lenses thereto without the use of drugs.

In *Ex parte* Hayden, 147 Cal. 649, the Supreme Court of this state held as follows:

> "It has come to be well recognized that the liberty and the pursuit of happiness in which the individual is protected by the Constitution of the United States and of the state applies as fully to his right of contract, his right to follow a legitimate vocation, untrammeled by unnecessary regulations, as it does to the freedom from arrest or restraint of his person. This subject has received recent consideration

by this court, and it is unnecessary to do more than refer to *Ex parte* Dickey, 144 Cal. 234, 103 Am. St. Rep. 82, 77 Pac. 924.

"Putting out of contemplation, therefore, the fundamental right of the government to subject private property to taxation and to take such property in time of public calamity and peril, the right of the state to impose burdens upon such property where the business is legitimate and innocuous—in other words, to regulate harmless vocations—is found in the police power alone. (Young v. Commonwealth, 101 Va. 853, 45 S. E. 327; Holden v. Hardy, 169 U. S. 266, 18 Sup. Ct. 383.) The police power deriving its existence from the rule that the safety of the people is the supreme law, justifies legislation upon matters pertaining to the public welfare, the public health or the public morals. (Cooley on Constitutional Limitations, 7th Ed., p. 837; Ruhstrat v. People, 185 Ill. 133, 76 Am. St. Rep. 30, 47 N. E. 41.) But the legislature, under the guise of police regulations, cannot enact laws which do not pertain to one or the other of these objects, and which impose onerous and unnecessary burdens upon business and property. By this court it has been said (*Ex parte* Whitwell, 98 Cal. 73, 35 Am. St. Rep. 152, 32 Pac. 870): 'But it is not true that when this power is exerted for the purpose of regulating a business or occupation which in itself is recognized as innocent and useful to the community, the legislature is the exclusive judge as to what is a reasonable and just restraint upon the constitutional right of the citizen to pursue such business or profession. As

> the right of a citizen to engage in such a business or follow such a profession is protected by the constitution, it is always a judicial question whether any particular regulation of such right is a valid exercise of legislative power. * * * This principle is stated very forcibly in the case of Mugler v. Kansas, 123 U. S. 661, 8 Sup. Ct. 273, in the following language: "The courts are not bound by mere forms, nor are they to be misled by mere pretense. They are at liberty—indeed, are under a solemn duty—to look at the substance of things whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution."'"

See also the following language in *Ex parte* Dickey, 144 Cal. 234:

> "The limit to the exercise of police power in these cases must be this: 'The regulation must have reference to the comfort, safety or welfare of society.' In the same connection, this court has said (Sonora v. Curtin, 137 Cal. 583): 'A police regulation or restraint is for the purpose of preventing damage to the public or to third persons. There are certain lines of business and certain occupations which require police regulation because of their peculiar character, in order that any

harm may not come to the public or that the threatened danger may be averted. Where the profession or business is not dangerous to the public, either directly or indirectly, it cannot be subjected to any police regulation whatever which does not fall within the power of taxation for revenue.' It appears, therefore, that the due exercise of the police power is limited to the preservation of the public health, safety and morals, and that legislation which transcends these objects, whatever other justification it may claim for its existence, cannot be upheld as a legitimate police regulation.

"The business in which this defendant is engaged is not only innocent and innocuous, but is highly beneficial. There is nothing in the nature of the business, therefore, that in any way threatens or endangers the public health, safety, or morals. Nor, indeed, is the purpose of this statute to regulate in these regards, or in any of them. The declared purpose and the plain effect of the above-quoted section is to limit the right of an employment agent in making contracts, a right free to those who follow other vocations, and arbitrarily to fix the compensation which he may receive for the services which he renders.

"Here, then, is laid down a most drastic rule governing the conduct of a man in the prosecution of a harmless, legitimate and beneficial business. Under the Constitution of the United States and of this state, the protection guaranteed in the possession of property and in the pursuit of happiness is extended, as of necessity it must be, to cover the right to acquire

property, and the right to acquire property must and does include the employment of proper means to that end. Says Judge Cooley (Constitutional Limitations, 7th Ed., p. 889): 'The general rule undoubtedly is that any person is at liberty to pursue any lawful calling, and to do so in his own way, not encroaching on the rights of others. This general right cannot be done away.'"

Ex parte Drexel, 147 Cal. 763;

1 L. R. A. (N. S.) 813;

129 Am. St. Rep. 293;

14 L. R. A. 581;

Ex parte Knapp, 127 Cal. 101;

Ex parte Sing Lee, 96 Cal. 354;

Von Harlingen v. Doyle, 134 Cal. 53;

In the Matter of Mary Maguire, 57 Cal. 604;

Lassen County v. Cone, 72 Cal. 387;

Ex parte Jenzsh, 112 Cal. 468;

Diepenbrock v. Superior Court, 153 Cal. 597;

Particularly *Ex parte* McNulty, 77 Cal. 164;

Hewitt v. Board of Medical Examiners, 148 Cal. 595.

It is not within the power of the legislature to enact a special law under the guise of a police regulation as the act complained of granting immunity to the practitioner who employs drugs in determining the accommodative

and refractive states of the human eye and imposing police regulations upon all others who do not employ drugs in their practice. Under the law complained of the practitioner who employs drugs in determining the accommodative and refractive states of the human eye is not amenable to the law. He may pursue his practice in the use of drugs on the human eye and work irreparable and incurable injury upon the public so long as he does not make use of the harmless and simple appliances known as the trial frame and test card, and it would be antagonistic to reason to hold that such an act is valid and authorized by the police power of the state. If any act could be so framed as to be more unreasonable and unjust in its application in this regard we fail to see how it could be so.

Quoting from the opinion rendered in the case of the State v. Gardner, 58 Ohio 599, 41 L. R. A. 689, the Supreme Court of that state held a certain law which endeavored to regulate the licensing of plumbing unconstitutional because of its unequal and unjust discrimination between persons engaged in the same calling, the following language is used:

> "Our bill of rights prohibits granting of privileges to one which are denied to others engaged in the same calling or profession, and the imposition of restrictions,

> burdens and police regulations upon certain citizens from which others engaged in the same business are exempt is in violation of the constitutional guarantee under the Fourteenth Amendment of the Constitution of the United States and is therefore void. A statute, therefore, which arbitrarily discriminates between persons engaged in the same business or profession cannot be sustained because it is in contravention of the equal rights which all are entitled to in the equal enforcement of the law, under the guarantees of the Fourteenth Amendment of the Federal Constitution."

That plaintiff is a graduate of the McCormick Medical College of Chicago, a reputable school of scientific knowledge, teaching the practice of opthalmology and neurology without the use of drugs, an institution duly incorporated under and by virtue of the laws of the state of Illinois. That plaintiff is in every way qualified to practice her profession of opthalmology. That the act herein complained of arbitrarily discriminates against every other school of scientific knowledge and practice in favor of the school employing drugs in determining the accommodative and refractive states of the human eye and is therefore unconstitutional and void.

That the said act complained of was not authorized by the police powers of the state which extends only to such measures as are

reasonable; that all police regulations must be reasonable under all circumstances; in every case it must appear that the regulations adopted are reasonably necessary and appropriate for the accomplishment of a legitimate purpose. A statute to be within this power must be reasonable in its operation upon the persons whom it affects, not arbitrarily discriminative nor unduly oppressive. The validity of a police regulation, therefore, primarily depends on whether, under all the circumstances, the regulation is reasonable, affording the public the protection intended or arbitrary, and whether it is designed to accomplish the purpose properly coming within the scope of the police power. In order to sustain the legislative inference by virtue of the police power under a statute of a state, it is necessary that the act should have some reasonable relation to the subjects included in such power, and the law must tend, in a degree that is perceptible and clear towards the preservation of the public welfare, and any act failing in this respect cannot claim the protection of the police power of the state. The police power must be exercised to be justifiable toward the prevention of some offense or manifest evil or to the furtherance of some object within the scope of police power. The mere assertion by the legislature that a statute relates to the public health, safety or

welfare, does not in itself bring that statute within the police power of the state, for there must be obvious and real connection between the actual provisions of a police regulation and its avowed purpose, and the regulation adopted must be reasonably adapted to accomplish the end sought to be obtained. Whether a law meets these requirements or not, is a matter to be judicially ascertained and settled by the courts of the country. A constitutional right cannot be abridged by the legislature under the guise of a police regulation, since the legislature has no power under a guise of a police regulation to invade arbitrarily the personal rights and personal liberty of the individual citizen, or to arbitrarily interfere with his business or profession, or to impose unusual and unnecessary or discriminatory restrictions on lawful occupations.

What apparent danger to the health, morals and welfare of the public could have existed that made it reasonable and necessary for the legislature of the state of California to invoke the police power of the state to deny the drugless practitioner the right to determine the accommodative and refractory states of the human eye by the simple and harmless method of employing the trial frame and test card? If the practitioner who employs drugs in measuring the range of human vision and in

determining the accommodative and refractive states of the human eye is not a menace to the public health, morals and welfare of the public, and was therefore relieved from the operation of the said optometry law, why was it necessary to invoke the police powers of the state against the practioner who employed no drugs but the simple, harmless mechanical device known as the trial frame and test card? It is a well known fact that the employment of drugs in any form upon the human eye is at all times extremely dangerous and usually followed by disastrous results. If it is not necessary under the act complained of for the practitioner who uses drugs on the human eye to possess certain knowledge or qualifications, why was it necessary that the drugless practitioner should possess these qualifications? That under the act complained of the plaintiff is denied the equal protection of the law in contravention of her rights under the Fourteenth Amendment of the Constitution of the United States.

Police regulations cannot arbitrarily interfere with the enjoyment of the rights of property, or the personal rights guaranteed by the Federal Constitution, and where a business or profession in itself is harmless and legitimate, the power of the state to regulate it is not the equivalent of the power to destroy. All statutory restrictions are imposed upon the theory

that they are necessary for the safety, health or comfort of the public.

Hence, if a restriction or regulation is without reason or necessity, it cannot be enforced. Police regulation which impairs or destroys, rather than preserves and promotes, is within the condemnation of the constitutional guarantee. It has been said that the scope of the term "reasonable" as regards any regulation must be measured, having regard to the fundamental principles of human liberty as understood at the time of the formation of the constitution adapting the same to modern conditions, and the measure of the reasonableness of a police regulation is what is appropriate under all the circumstances to the purposes to be attained, and whether or not it is in fact a *bona fide* exercise of the police power of the state, whether it was really intended to protect the public against the threatened danger or to affect some private or questionable purpose. These matters are proper for judicial determination. It is also said that in proportion to the severity or extent of the police regulations must a strict observance of the constitutional limitations upon the police power be required, and if a statute invades the rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the constitution.

We maintain, first, that the practice of optometry or the measuring of the range of human vision by the use of the simple and inoffensive trial frame and test card is a practice in itself absolutely inoffensive and harmless and not subject to police regulation. Second, that the act complained of, known as the optometry law, is not a *bona fide* exercise of the police power in that it makes no attempt to protect the public from the indiscriminate use by incompetent practitioners of dangerous drugs in determining the accommodative and refractory states of the human eye, but expressly relieves them from the operation of the law.

That the said law is special, highly discriminatory and void because the act in question arbitrarily exempts the practitioner who employs drugs from its operation and imposes arbitrary and unjust burdens as against every other person employing any other means than drugs in determining the accommodative and refractive stages of the human eye. That the said act creates a monopoly favored by law in the practice of optometry by the use of drugs. That under the terms of said act complainant is denied the equal protection of the law in contravention of her rights under the Fourteenth Amendment to the Constitution of the United States, and it is, therefore, unconstitutional and void.

Respectfully submitted,
TOM L. JOHNSTON,
Attorney for Plaintiff.

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No. 25315

IN THE

Supreme Court of the United States

October Term, 1916.

No. 1032.

KATE P. McNAUGHTON,

Appellant,

vs.

HIRAM W. JOHNSON, Governor of the State of California, U. S. WEBB, Attorney General of the State of California, and THOMAS LEE WOOLWINE, District Attorney of the County of Los Angeles, State of California,

Appellees.

BRIEF ON BEHALF OF APPELLEES.

STATEMENT OF THE CASE.

This proceeding is an appeal from an order refusing an interlocutory injunction, the appellant seeking to secure an intermediate restraining order, enjoin-

ing the appellees, as officers of the state of California, from enforcing the provisions of a law in that state known as the Optometry Practice Act.

The appellant filed her bill in equity in the District Court of the United States for the Southern District of California, Southern Division, asking a decree of that court, adjudging such law, heretofore referred to, to be unconstitutional, and granting an interlocutory injunction, restraining the enforcement of the law, and praying that, at the termination of the suit, a permanent injunction be granted to restrain the enforcement of the law as against the appellant.

The application for the interlocutory injunction was made in the usual manner under the terms of section 266 of the Judicial Code of the United States, and was heard by the Honorable Erskine M. Ross, Circuit Judge of the United States, and the Honorable Oscar A. Trippet and the Honorable E. E. Cushman, district judges, and these judges, after listening to argument, denied the interlocutory injunction, and, at the same time, handed down a memorandum of opinion, in which it was indicated that, in their judgment, the question was addressed to the sound discretion of the court. It was also stated that it was the understanding that these judges were not called upon to decide the merits of the suit. (See transcript, page 20.)

It is the opinion of the writer of this brief that the paramount question to be reviewed in this appeal is whether the judges, in denying the interlocutory injunction, abused their discretion. The merits of

the suit, if we confine argument to its strict limitations, can hardly be reviewed by this court under this appeal, but inasmuch as the subject matter is a broad one, and, in the ultimate analysis, the facts charged in the bill of complaint blend themselves into a question of law, we desire to urge the merits of the entire controversy, and, with this end in view, will give our best attention to the broad question touching the constitutionality of the law attacked by appellant.

The text of the law which is questioned is fully set forth in the bill of complaint (see transcript, pages 4, 5, 6, 7, 8 and 9). In substance, it was intended by its terms to regulate the practice of what is known as the profession of optometry in the state of California, the profession of optometry being the practice by mechanical means of correcting refractive errors of the human eye by the adaptation of lenses thereto instead of by medical or surgical means. While the work of the oculist or physician is the application of a remedy based upon a diagnosis, the work of the optometrist is purely mechanical, and his conclusions are determined mathematically.

We desire to accord the subject of this brief the fullest treatment, and, in order to proceed in an orderly manner, we will separate our theme into two obvious divisions. First, we have to consider the discretion of the three judges whose order denied to appellant her application for an interlocutory injunction, and we assert that, should this court decide adversely to appellant on this single phase, all other questions in dispute are thereby disposed of. Second,

we intend to treat of the law which appellant urges be nullified by the decree of the district court. This law, embraced, as it is, in appellant's bill, is thus made a part of her pleading and is in this manner thrust into the controversy without proof. The motion for an interlocutory injunction was based upon the bill. In the absence of contrary testimony and proof, the bill should stand as true, the truth of the facts alleged being assumed for the purpose of argument.

The invalidity of the law attacked, while alleged by complainant in her bill, is a matter of law rather than fact, notwithstanding that custom and conventionality of pleading require its invalidity to be asserted as a fact. A discussion of the validity of the terms of the Optometry Law, which is made a part of the pleading, the soundness of its text, and the propriety and constitutionality of its provisions, is appropriate.

BRIEF

PART ONE.

DENIAL OF THE INTERLOCUTORY INJUNCTION WAS THE ONLY ORDER APPROPRIATE AND JUSTIFIED UPON SHOWING MADE BY APPELLANT.

When complainant made her application for an injunction, she had no ground upon which to base her application other than her complaint, which, in the opinion of the writer of this brief, did not contain sufficently comprehensive allegations to furnish a showing justifying such intermediate relief.

A fundamental and underlying principle of equity relief is that an allegation of irreparable injury is essential to found a suit for temporary or permanent injunctive relief. As a general rule equity will not interfere by injunction unless the injury is irreparable.

Kirwin vs. *Murphy,* 189 U. S. 35;
Ritter vs. *Patch,* 12 Cal. 298;
Branch Turnpike Co. vs. *Board of Supervisors,* 13 Cal. 190;
Geurkink vs. *Petaluma,* 112 Cal. 306;
Meyers vs. *Ives,* 28 Colo. 461;
Johnson vs. *Baltimore, etc. R. Co.,* 4 App. Cas. D. C. 491;
State vs. *Wood,* 155 Mo. 425;
Campbell vs. *Seaman,* 63 N. Y. 568;
Western Union Tel. Co. vs. *Norman,* 77 Fed. 13.

A close and painstaking scrutiny of the complaint bill fails to disclose any allegation that complainant will be injured either greatly or irreparably. It is true that there is a vaguely comprehensive allegation in paragraph three of her complaint which includes the clause, "that she is dependent entirely upon the proceeds of her labor and services as a practicing ophthalmologist." This is not coupled with any allegation of injury, nor is there contained in the bill any assertion that plaintiff is not able to secure support from other sources or to follow any other vocation. Without an allegation of injury, it is an elementary principle that a pleader fails to bring his cause within the restricted sphere of equitable relief.

Mechanics' Foundry vs. *Ryall,* 75 Cal. 601;
Jacob vs. *Day,* 111 Cal. 571; 44 Pac. 243;
Atkins vs. *Chilson,* 7 Metc. (Mass.) 398;
Willcox vs. *Trenton Potteries Co.,* 64 N. J. Eq. 173.

Equity will not interfere where complainant's injury is merely theoretical and nominal.

Newby vs. *Highway Commissioners,* 21 Ill. App. 245;
People vs. *New York Canal Board,* 55 N. Y. 390.

TRUAX VS. RAICH, 239 U. S. 33.

The opinion in the above case is rich in precedent and is so broad in principle that we have examined its text with great care to learn in what way, if any, the case has widened the field of equity jurisdiction and thus has opened to aggrieved litigants a haven

theretofore closed to their appeals. We were strongly inclined to meet appellant's argument by disputing his right to go into equity to bar a criminal prosecution. We believe it elementary that he could not resort to such jurisdiction, if, by meeting what he deemed an invasion of his rights by redress at law, he was afforded an adequate remedy, that is, a remedy which, when complete, determined his claim and alleviated the ill which he had suffered, for "suits in equity shall not be sustained in any court of the United States in any case, where a plain, adequate and complete remedy may be had at law."

Section 267 of Judicial Code of United States.

In the case of *Truax* vs. *Raich,* there was under consideration a law enacted in the state of Arizona by initiative measure, making it a penal offense to employ less than 80 per cent qualified electors or native born citizens in any kind of work. The facts appeared to be that Raich, the appellee, was employed as a cook in the city of Bisbee. After the adoption of this measure by the people, he was notified by his employer that he would be discharged solely by reason of the requirements of this law. Hence the suit that resulted in the decision now under discussion. It will be noted that Raich, as an employee, was not subject to prosecution, but that the penal clause of the law was applicable to his employer, who, fearing the enforcement of the law, discharged the appellee from his employment.

In the opinion, it was said by Mr. Justice Hughes:

"It is also settled that while a court of equity, generally speaking, has 'no jurisdiction over the prosecution, the punishment or the pardon of crimes or misdemeanors' (*In re Sawyer*, 124 U. S. 200, 210), a distinction obtains, and equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecutions is essential to the safeguarding of rights of property. *Davis & Farnum Mfg. Co.* vs. *Los Angeles*, 189 U. S. 207, 218; *Dobbins* vs. *Los Angeles*, 195 U. S. 223, 241; *Ex parte Young*, supra; *Philadelphia Co.* vs. *Stimson*, supra, p. 621. The right to earn a livelihood and to continue in employment unmolested by efforts to enforce void enactments should similarly be entitled to protection in the absence of adequate remedy at law."

Again the court said:

"It is further urged that the complainant can not sue save to redress his own grievance (*McCabe* vs. *Atchison, Topeka & Santa Fe Railway*, 235 U. S. 151, 162); that is, that the servant can not complain for the master, and that it is the master who is subject to prosecution, and not the complainant. But the act undertakes to operate directly upon the employment of aliens and if enforced would compel the employer to discharge a sufficient number of his employees to bring the alien quota within the prescribed limit. It sufficiently appears that the discharge of the complainant will be solely for the purpose of meeting the requirements of the act and avoiding threatened prosecution under its provisions.

> It is, therefore, idle to call the injury indirect or remote. It is also entirely clear that unless the enforcement of the act is restrained the complainant will have no adequate remedy, and hence we think that the case falls within the class in which, if the unconstitutionality of the act is shown, equitable relief may be had."

This opinion, then, settles for all time the right of a person who has no adequate remedy at law to enjoin the enforcement of an unconstitutional enactment of a state by resort to the federal tribunal. It still leaves the question as to what constitutes an adequate remedy at law in the obscurity which has surrounded the frequently repeated phrase since its principle was first enunciated. It was this court's opinion that the appellee in the case of *Truax* vs. *Raich* had no adequate remedy at law.

But does it follow that the same facts exist in the case at bar? We do not agree with the Honorable Court, which passed upon the merits of the interlocutory injunction in the case at bar, that the decision in *Truax* vs. *Raich* was sufficient precedent to determine its own jurisdiction. The appellant in the case at bar and the appellee, Raich, were not in the same or similar circumstances. Raich was discharged from employment; he was not in fear of criminal prosecution. It is true that his employer was in fear of a criminal prosecution, but there was not open to the employee, Raich, the opportunity of taking the case by writ of error to this court from a judgment of a local court of criminal jurisdiction.

Therefore, Raich had no adequate remedy at law. In the case at bar, the appellant, if arrested and convicted, might take her case to this court by writ of error. It is the recollection of the writer that such course has been uniformly pursued in the instances where the legislative measures of California and its political subdivisions have been under attack.

The rule is general that equity has no jurisdiction to enjoin a prosecution for a criminal offense in a court of law.

1 Joyce Injunctions, Sec. 58–60*a*.
In re Sawyer, 124 U. S. 200;
Fitts vs. *McGhee,* 172 U. S. 516;
Bosley vs. *McLaughlin,* 236 U. S. 385;
Arbuckle vs. *Blackburn,* 113 Fed. 616;
Davis and Farnum Mfg. Co. vs. *City of Los Angeles,* 189 U. S. 207;
Davis and Farnum Mfg. Co. vs. *City of Los Angeles,* 115 Fed. 537;
Logan & Bryan vs. *Postal Telegraph Co.,* 157 Fed. 570;
Brown vs. *Mayor, etc., of Birmingham,* 140 Ala. 590;
City of Denver vs. *Beede,* 25 Colo. 172; 54 Pac. 624;
Crighton vs. *Dahmer,* 70 Miss. 602;
Wallack vs. *Society,* 67 N. Y. 23.

This principle is explained in the case of *In re Sawyer,* 124 U. S. 200, in which case this court said:

"The modern decisions in England, by eminent equity judges, concur in holding that a court of

> chancery has no power to restrain criminal proceedings, unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there. [Citing cases.]

In the case of *Davis and Farnum Mfg. Co.* vs. *City of Los Angeles,* 115 Fed. 537, Judge Wellborn, of the District Court, denied the jurisdiction of a court of equity to enjoin a criminal prosecution. This decision was affirmed in the United States Supreme Court. (See *Davis and Farnum Mfg. Co.* vs. *City of Los Angeles,* 189 U. S. 207.)

The case of *Dobbins* vs. *Los Angeles,* 195 U. S. 223, it is true, departed from the general rule, but an examination of the opinion in that case will make it apparent that this court considered the fact exceptional and the remedy necessary under the circumstances. It was a drastic remedy applied to a local but patently corrupted political situation. The following cases are instructive in this phase of equity intervention:

> *Sullivan* vs. *San Francisco Gas Co.,* 148 Cal. 371;
> *Brown* vs. *Mayor,* 140 Ala. 590;
> *Denver* vs. *Beede,* 25 Colo. 172.

While it is undoubtedly an axiom of law that the right to work and earn a living is a valuable right in the nature of property, yet the right to practice a profession is not a vested right, but is a license, revocable for cause, and within the power of a sovereignty to grant or withhold, subject only to the

requirement that it be extended to all upon an equal basis.

Dent vs. *West Virginia,* 129 U. S. 114;
Hawker vs. *New York,* 170 U. S. 189;
Watson vs. *Maryland,* 218 U. S. 173–179;
Collins vs. *Texas,* 223 U. S. 288;
State vs. *McIntosh,* 205 Mo. 616, 636.

Indeed, it was said in the case of *State* vs. *McIntosh, supra,* that no individual has a vested right to practice dentistry. In this connection, Mr. Justice Lamm said, "the theory that an individual has a vested right to practice dentistry is a rank heresy, finding no place in the philosophy of the law."

We have been reviewing such ground as appears to present a reasonable foundation for the order denying the appellant's application for an interlocutory injunction. In sequence of argument, we then come to the logical finale of all controversies bearing upon the grant or refusal of interlocutory orders, that is to say, an examination of the fact as to whether the order was within the sound discretion of the court of original jurisdiction. The granting or withholding of injunctive redress is always within the discretion of the tribunal addressed and should be exercised upon principles of equity and good conscience.

Coopey vs. *Keady,* 139 Pac. (Ore.) 108;
Martin vs. *Murphy,* 216 Mass. 466;
South, etc., R. Co. vs. *R. R. Commission,* 210 Fed. 465.

Indeed, it was said in *Magruder* vs. *Belle Fourche Valley Water Users Ass'n,* 133 U. S. C. C. A. Rep. 524–534, by Mr. Justice Sanborn, whose opinion in the Eighth Circuit, Court of Appeal, in this decision of December 8, 1914, constitutes a late and emphatic declaration upon the subject:

> "The granting or dissolution of an interlocutory injunction rests in the sound judicial discretion of the court of original jurisdiction and when that court has not departed from the rules and principles of equity established for its guidance, its orders in this regard may not be reversed by the appellate court *without clear proof that it abused its discretion.* It is to the discretion of the trial court, not to that of the appellate court, that the law has intrusted the power to grant or dissolve such an injunction and the question here is: DOES THE PROOF CLEARLY ESTABLISH AN ABUSE OF THAT DISCRETION BY THE COURT BELOW?

To this principle is cited:

Am. Grain S. Co. vs. *Twin City S. Co.,* 202 Fed. 202.

In the last cited case, the same principle is enunciated and to it are cited the following cases:

Fireball G. T. & I. Co. vs. *Commercial Acetyline Co.* (C. C. A.) 198 Fed. 650, 653;

Massie vs. *Burck,* 128 Fed. 27, 31; 62 C. C. A. 535, 539;

Love vs. *A. T. & S. F. Ry. Co.,* 185 Fed. 321, 330; 107 C. C. A. 403;

High on Injunctions (4th Ed.) Sec. 1696.
Higginson vs. *C. B. & Q. R. R.*, 102 Fed. 197, 199; 42 C. C. A. 254, 6;
Interurban Ry., etc., vs. *Westinghouse E. & M. Co.*, 186 Fed. 166, 170; 108 C. C. A. 298, 302.

This court has declared that there can be no doubt that an appellate court will not interfere with a decision of the chancellor, refusing to grant an interlocutory injunction, unless it clearly appears that there has been an abuse of discretion.

L. & N. R. R. Co. vs. *United States*, 238 U. S. 1–9.

This principle, so well settled that the most disputatious counsel will not gainsay its permanency, must guide in this appeal, for it is an appeal from the order of the three judges in the district court, denying an interlocutory injunction, unless it is possible to show that the discretion of the learned judges was abused.

We maintain that such a showing is impossible in the face of a defective bill, containing no statement of great or irreparable damage, not indicating any property rights involved, and upon its face a mere artificial demand for a remedy which lies within the domain of law and not of equity.

The appellant's bill makes no showing as to her income derived from the practice of ophthalmology, or that complainant could not earn a livelihood otherwise, or that she could not subject herself to the same test of competency as others who desire to practice a system governed by the field of optometry. No

damage is shown other than that which the court must infer from the expression, "that she is dependent entirely upon the proceeds of her labor and services as a practicing ophthalmologist." The legal conclusion of complainant, stated in paragraph 13 of her complaint, that the suit is authorized by law under section 266 of the Judicial Code, does not of necessity decree a possibility or settle the fact. The right to a restraining process in any court must rest in principle upon an invasion of property rights, and the court of original jurisdiction had every reason to deny an interlocutory injunction upon considerations so unconvincing and inadequate. Complainant, if arrested, might take her case in orderly fashion by writ of error to this court from the decree of the court of last resort in California, affirming a judgment of conviction. Such is her legal remedy.

WHAT IS AN ABUSE OF DISCRETION?

The opinion of this court in the case of *L. & N. R. Co.* vs. *United States,* 238 U. S. 1, 9, is sufficient authority to support the postulate that the refusal of an interlocutory restraining order may be improper where the act sought to be restrained (in that case it was an order of the Interstate Commerce Commission, reducing a freight rate of a railroad company) operates to reduce revenue. In the case at bar no showing, similar in effect, is made. It probably follows that if the appellant's practice is interfered with, her revenue from it ceases, but it

does not follow that she loses her income unless it is established that other means of support are foreclosed to her and that she could not qualify, for arbitrary reasons, under the test of ability provided by the State Optometry Practice Act. The manifest distinction between the cases dispenses with the need of argument on this score. There is no very definite data covering instances illustrating an abuse of discretion. It seemed to be the sense of the court in a New York case that it would have been an abuse of discretion to grant an injunction in advance of the trial, where the owner of premises sought in equity to restrain a tenant from conducting a business of recording bets upon horse races in his premises, where there was no allegation in the complaint that the business was injurious to the plaintiff or to the premises demised, and where there was no allegation of damage. It was held that a demurrer to the complaint might be sustained and that the court should not be called upon to determine the legality or illegality of the business upon a mere motion.

DeLacy vs. *Adams,* 52 N. Y. St. Rep. 509.

Although the granting of an injunction is to a certain extent a matter of discretion with the court, yet, where no equitable case appears upon the record, it has been held to be an abuse of discretion to issue a restraining process.

Thompsonville Scale Mfg. Co. vs. *Osgood,* 26 Conn. 16.

If the case just cited states the correct doctrine, the only abuse of discretion which might have been charged to the court of original jurisdiction in the case at bar would have been the granting of an injunction upon the defective pleading of complainant. Contradistinguished from arbitrary discretion and from a lack of discretion, sound discretion consists of an observance of the rules and considerations which generally guide and influence courts in granting preliminary injunctions. In any given case such discretion is shown in the steady judgment with which the court applies the general rules to the particular fact with which it has to deal.

It was said in a well-known federal case that there are certain well settled rules regulating the granting of preliminary injunctions. They are that the complainant must show a clear, legal or equitable interest or right which is to be protected; that there must be a well grounded apprehension of immediate injury to those rights or interest, and a clear necessity must be shown of immediate protection to such interests or rights, which would otherwise be seriously injured or impaired. If it appear that the preliminary injuncton is not necessary to preserve the interests or property in *statue quo* until final hearing, and the rights of the complainant will suffer no serious injury until that time, or that the injury threatened is of such nature that it can be remedied on final hearing, then the injunction ought not to be granted, and so, if it

appear that the complainant's rights are not sufficiently clear and the consideration of the respective convenience or inconvenience to the parties, complainant and defendant, when balanced, show that serious injury may be done to the defendant by the granting of the injunction, and no serious injury will be done complainant by withholding it until final hearing, then the injunction ought not to be granted.

Rend vs. *Ventura Oil Co.*, 48 Fed. 248;
Finger vs. *Kingston*, 29 N. Y. St. Rp. 702.

It is said that the granting of an injunction is a judicial act; not only is it so, but it requires the exercise of the soundest judicial discretion, founded not upon arbitrary notions of justice or of right and wrong, but on a knowledge of the settled rules of equity.

Commercial Bank vs. *State*, 4 S. & M., Miss., 439;
Harriman vs. *Northern Securities Co.*, 132 Fed. 464.

Believing, then, that, in the case at bar, the application being made upon what we believe to be an incomplete pleading, with no particular showing of damage or great or irreparable injury, and with no showing that an adequate remedy at law did not exist in the premises, excepting the mere conclusion, the court exercised the soundest discretion and permitted no error of judgment in its order denying appellant's motion for an interlocutory injunction, we submit that the order should be affirmed.

PART TWO.

THE OPTOMETRY PRACTICE ACT SHOULD BE SUSTAINED AS A VALID MEASURE.

This act is known as an act to regulate the practice of optometry, which is defined by section two thereof to be "the employment of any means other than the use of drugs for the measurement of the powers or range of human vision or the determination of the accommodative and refractive states of the human eye, or the scope of its functions in general or the adaptation of lenses or frames for the aid thereof." It is proper for the states to enact measures for the general welfare of their people and to place restrictions upon the practice of professions which will secure their people against the consequences of ignorance and incapacity.

Dent vs. *West Virginia,* 129 U. S. 114.

The practice of optometry has been very ably explained in the case of *Martin* vs. *Baldy,* 249 Pa. St. 253. It was there said to be the profession of examining the eyes of patients to ascertain the range of vision, visual powers in general, the extent of the visual field, the refractive state or condition of the eye, and the possible movement of the eyeball. The court continuing in its opinion said:

> "It is well established that optometrists do not use medicines in the performance of their work, nor do they resort to anything in the nature of surgical treatment."

Further:

> "It appears from the proofs that the business or profession of optometry is one of ancient standing. Until a comparatively recent date a large part of that which is done by optometrists was exclusively within their province and was not covered in practice by the efforts of the physician or surgeon. Within the last quarter of a century, or thereabouts, it appears from the proofs that, among those who are engaged in the making of lenses to correct or cure defects in eyes, there has arisen a classification or division, whereby some who make lenses confine themselves entirely to the work of making them in accordance with prescriptions given by physicians or oculists. These call themselves or are known as 'opticians'; others, who still manufacture the lenses, either according to their judgment or the prescription of physicians, do not confine themselves to the making of lenses, but also examine the eyes for the purpose of ascertaining whether there are such defects visible as can be corrected by the application of lenses. This class have taken the name of 'optometrists,' and that is the name by which they are now generally known."

The court distinguished the practice of optometry from the practice of medicine, and in language which follows explained the distinction between these professions:

> "Can it be said that men who are engaged in a business of recognized and ancient standing such as optometrists, would have been likely, upon being made aware that a bill was pending in the

legislature, having such a title as that which has been cited and quoted, to regard it as having any possible application to themselves? If not, then, they would have been deprived of the opportunity to protest or make suggestions, which, as we understand the case, the constitutional requirement as to the nature of a title of a statute was intended to provide.

"These men are not practicing medicine in a popular sense of the term. They give and prescribe no medicines. Nobody pretends that they ever resort to surgery. Why, then, supposing one or more of these optometrists had been informed of the pendency of such a bill in the legislature would he reasonably or naturally have regarded the bill as intended to affect people engaged in the same business that he was conducting?"

Again:

"A good deal has been made in the case, of the prohibition in the first section of the act of 1911, applicable to persons who 'diagnose diseases.' It has been claimed that the plaintiffs and other optometrists do diagnose diseases. The proofs in the case are to the effect that optometrists, examining the eye of a patient, either with or without the aid of artificial means, in case they find that the interior of the eye is clouded and gives ground for suspicion that there is some disease of the eye, inform the patient that for his own protection and safety, he should consult a physician. We understand that under such circumstances the optometrists decline to furnish lenses for the patient."

It is sufficient, in the language of the learned judge, just quoted, to indicate in general the reasons which may have dictated the legislative body to license the practice of optometry.

That the profession of adjusting lenses to the human eye is one which requires skill, practice and study, no person will have the temerity to deny. As was said by the learned judge, just quoted, if the optometrist finds in the interior of the eye any condition that supports a suspicion of disease, he directs his patient to a physician, who, by virtue of his more extended training, may treat the condition medically or surgically, as his professional judgment dictates. It appears logical that an optometrist should be examined and licensed upon a basis of merit and learning, not only that he may properly adjust the lens to the eye, but that he may recognize abnormal organic conditions when his investigation of the eye of his customer brings them to his light.

This question can not be lightly treated. Our adversary's expression that the use of the trial frame and test card is a practice in itself absolutely inoffensive and harmless is a self-negativing platitude. The practice of ophthalmology, if it be the same as the practice of optometry—and it must be co-extensive or appellant's case falls—is a practice which can only be pursued after a complete training. (See appellant's brief, page 12.) The practice of optometry includes an examination of the eye and a diagnosis for refractive error. That a trial frame and test card may be used in this practice does not minimize the

responsibility of the practitioner. It requires no experience or learning to determine that harm may befall the patient of an unskilled optometrist, for is not he dealing with the most sensitive and delicate organ of the human body. (See appellant's brief, page 17.)

We believe that it sufficiently follows that the practice should be licensed and in the following cases it has received legal recognition in some form:

Tipton vs. *State,* 74 Tex. Crim. Rep. 225; 168 S. W. 97;
State vs. *Yegg,* 19 S. D. 234.

For decisions of general application to the regulation of professional activities, see

Dent vs. *West Virginia,* 129 U. S. 114;
Hawker vs. *New York,* 170 U. S. 189;
Reetz vs. *Michigan,* 188 U. S. 505;
Watson vs. *Maryland,* 218 U. S. 173;
Collins vs. *Texas,* 223 U. S. 288.
People vs. *Jordan,* Cal. Supreme Court, Mch. 24, 1916;
People vs. *Ratledge,* Cal. Supreme Court, Mch. 24, 1916;
People vs. *Hornef,* 154 Cal. 355;
Ex parte McManus, 151 Cal. 331;
Hewitt vs. *Board,* 148 Cal. 590;
Ex parte Whitley, 144 Cal. 167;
Ex parte Gerino, 143 Cal. 412;
Eastman vs. *State,* 109 Ind. 278; 58 Am. Rep. 400;
State vs. *Dent,* 25 W. Va. 1;
Ex parte Frazer, 54 Cal. 94;
Harding vs. *People,* 10 Colo. 387, 15 Pac. 727;

Williams vs. *People*, 121 Ill. 84, 11 N. E. 881;
People vs. *Blue Mountain Joe*, 129 Ill. 370, 21 N. E. 923;
State vs. *Mosher*, 78 Ia. 321, 43 N. W. 202;
Iowa Eclectic Medical College vs. *Schrader*, 87 Ia. 659, 55 N. W. 24, 20 L. R. A. 355;
Driscoll vs. *Commonwealth*, 93 Ky. 393, 20 S. W. 431;
Hewitt vs. *Charier*, 16 Pick. 353;
People vs. *Phippin*, 70 Mich. 6, 37 N. W. 888;
State vs. *State Medical Examining Board*, 32 Minn. 324, 50 Am. Rep. 575, 20 N. W. 238;
State vs. *State Board of Medical Examiners*, 34 Minn. 387, 26 N. W. 125;
State vs. *Fleischer*, 41 Minn. 69, 42 N. W. 696;
Craig vs. *Board of Medical Examiners*, 12 Mont. 203, 29 Pac. 532;
State vs. *District Court*, 13 Mont. 370, 34 Pac. 609;
Dogge vs. *State*, 17 Neb. 140, 22 N. W. 348;
C. Gee Wo vs. *State*, 36 Neb. 241, 54 N. W. 513;
Ex parte Spinney, 10 Nev. 323;
In re Roe Chung (N. M.), 49 Pac. 952;
In re Smith 10 Wend. (N. Y.) 449;
People vs. *Fulda*, 52 Hun. 65, 4 N. Y. Supp. 945;
State vs. *Van Doran*, 109 N. C. 864, 14 S. E. 32;
State vs. *Call*, 121 N. C. 643; 28 S. E. 517;
France vs. *State*, 57 Ohio St. 1; 47 N. E. 1041;
Barmore vs. *State Board Medical Examiners*, 21 Or. 301; 28 Pac. 8;
State vs. *Randolph*, 23 Or. 74; 31 Pac. 201; 37 Am. St. 655;
Logan vs. *State*, 5 Tex. App. 306;
People vs. *Hasbrouck*, 11 Utah 291;

For vs. *Territory*, 2 Wash. T. 297;
State vs. *Carey*, 4 Wash. 424; 30 Pac. 729.

And more recent cases are:
People vs. *Griswold*, 213 N. Y. 92;
Kettles vs. *People*, 221 Ill. 221.

We note the language of this court in a case originating in the New York jurisdiction:

> "No precise limits have been placed upon the police power of a state, and yet it is clear that legislation which simply defines the qualifications of one who attempts to practice medicine is a proper exercise of that power. Care for the public health is something confessedly belonging to the domain of that power. The physician is one whose relations to life and health are of the most intimate character. It is fitting not merely that he should possess a knowledge of diseases and their remedies, but also that he should be one who may safely be trusted to apply those remedies. Character is as important a qualification as knowledge, and if the legislature may properly require a definite course of instruction, or a certain examination as to learning, it may with equal propriety prescribe what evidence of good character shall be furnished. These propositions have been often affirmed. In *Dent* vs. *West Virginia*, 129 U. S. 114, 122, it was said in respect to the qualifications of a physician: 'The power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud.' "
>
> *Hawker* vs. *New York*, 170 U. S. 192–94.

THE TERMS OF THE OPTOMETRY ACT ARE NOT UNCONSTITUTIONAL AND THEIR VALIDITY IS AMPLY SUPPORTED BY PRECEDENT.

For the purpose of facilitating the discussion of this phase of the controversy, we desire to enumerate what we believe to be the points made by appellant in her bill of complaint, touching the unconstitutionality of the law.

1. That because plaintiff practices what she terms ophthalmology, which, according to her contention, is comprehended in the definition of the practice of optometry, she is discriminated against.

2. That the law is unconstitutional because it appropriates to the sole use of registered optometrists the right to employ means, other than the use of drugs, to measure the range of human vision.

3. That it tends to create a monopoly, in that physicians and surgeons are relieved from the operation of the law.

Analyzing appellant's various contentions, they are narrowed down to the one question whether the practice of measuring the range of human vision by lenses and frames or other drugless means should be regulated. Counsel for appellant takes the position that because appellant calls her practice that of ophthalmology, although admitting that it covers the same field as optometry, she is discriminated against by the optometry law, because she is required to take an examination. This contention is the height of

absurdity. Let us lay aside the terms "ophthalmology" and "optometry" and say that any person who measures the range of the human vision and adjusts lenses to the eye to correct defects in vision, without the use of drugs, shall be required to submit himself to an examination by persons who are familiar with that practice. If ophthalmology is the practice, as set up in the bill of complaint of appellant, of fitting glasses to the human eye and treating inflammation of the eye, and she does not use drugs in such practice, then she is practicing what the law defines to be "optometry," and without reference to what she calls the practice, it remains that she is performing services in a vocation which requires study and training, and which is a licensed vocation, and that she seeks by calling it another name to escape the tests which are imposed upon all other persons under like conditions in such practice. All persons, without reference to their sex or quality, are permitted to become registered optometrists under the law upon equal terms and under equal restrictions. No single individual or class is the recipient of any favors, excepting a physician or surgeon, which exception we will discuss later in this brief. Therefore, if appellant desires to practice ophthalmology, as she terms it, or optometry, as it is termed in the law under consideration, or the practice of measuring the range of human vision, all of which terms convey the same import, she must engage to fulfill the same requirements, and no more, than other persons under the

same circumstances must fulfill. Because she is a "regularly graduated ophthalmologist," is no reason why she should be permitted to practice that profession without examination when others are not.

The case of *Collins* vs. *Texas,* 223 U. S. 288, is enlightening upon this subject. In that case the plaintiff in error had secured a writ of error directed to the court of last resort in Texas. He was what is known as an "osteopath." He treated a patient for hay-fever and was arrested. He sought the remedy of a writ of habeas corpus in Texas, and this was denied him. In this court his contention was that he was a graduate of the American School of Osteopathy, at Kirksville, Missouri, and that he was not practicing medicine under the Texas statute, inasmuch as osteopathy did not embrace the use of medicines. The provision of the Texas statute under discussion contained the following:

> "Any person shall be regarded as practising medicine within the meaning of this Act * * * (2) or who shall treat or offer to treat any disease or disorder, mental or physical, or any physical deformity or injury by any system or method, or to effect cures thereof, and charge therefor, directly or indirectly, money or other compensation."

Thus, it will be seen that the Texas statute defined the practice of medicine to consist of any system of treating disorders, whether medicines were used or were not used. Plaintiff in error contended that the

definition was arbitrary and irrational, but this court said:

> "But it would be immaterial if it were, as its only object is to explain who falls within the purview of the act. That it does, and of course we follow the Texas court in its decision that the plaintiff in error is included. It is true that he does not administer drugs, but he practices what at least purports to be the healing art."

In the case at bar, appellant contends that because she practices ophthalmology, which, according to her definition, is the same thing as the practice of optometry, she is discriminated against because she calls the practice by another name than that used in the law. This, it would seem, is the same argument used by plaintiff in error in *Collins* vs. *Texas, supra.*

Again this court said:

> "We should presume, until the Texas courts say otherwise, that the reference in section 4 to the diploma of a reputable and legal college of medicine, and the confining in section 7 of examinations to graduates of reputable medical schools, use the words medicine and medical with the same broad sense as section 13, and that the diploma of the plaintiff in error would not be rejected merely because it came from a school of osteopathy. In short, the statute says that if you want to do what it calls practicing medicine you must have gone to a reputable school in that kind of practice. Whatever may be the osteopathic dislike of medicines, neither the school nor the plaintiff in error suffers a constitutional wrong if his place of tuition is called a medical school

by the act for the purpose of showing that it satisfies the statutory requirements. He cannot say that it would not have been regarded as doing so, because he has not tried. *Dent* vs. *West Virginia,* 129 U. S. 114, 124."

And the reasoning which follows by this court in the same case is equally applicable to the case at bar. It was said on page 296 in the case cited:

"An osteopath professes, the plaintiff in error professes, as we understand it, to help certain ailments by scientific manipulation affecting the nerve centers. It is intelligible therefore that the state should require of him a scientific training. *Dent* vs. *West Virginia,* 129 U. S. 114; *Watson* vs. *Maryland,* 218 U. S. 173. He like others must begin by a diagnosis. It is no answer to say that in many instances the diagnosis is easy—that a man knows it when he has a cold or a toothache. For a general practice science is needed. An osteopath undertakes to be something more than a nurse or a masseur, and the difference rests precisely in a claim to greater science, which the state requires him to prove."

This, we believe, should dispose of this part of appellant's contention.

The next question raised is that the law appropriates to the use of registered optometrists the sole right to measure the range of human vision without drugs. This question harks back to the main and fundamental policy governing all legislation of this character. Is the law invalid because it creates by its terms a special field in which only certain persons,

who have proved their ability, may exercise their vocation? In other words, is it proper for the state to regulate the practice of optometry by excluding from such practice all persons who have not demonstrated their fitness to practice by examination or other appropriate test? If we put this query in other language, we would say, is the law unconstitutional which prohibits the practice of a vocation without a test of competency? Is it necessary to cover this entire subject matter again? It seems that it should not be necessary. This court in the cases which we have heretofore cited has consistently upheld the right of a state to exact certain qualifications from individuals before they engage in vocations which require study and skill.

This court said in a Michigan case that the power of a state to make reasonable provisions for determining the qualifications of those engaging in the practice of medicine, and punishing those who attempt to engage therein in defiance of such statutory provisions, is not open to question.

Reetz vs. *Michigan*, 188 U. S. 505.

And in the case of *Ex parte Whitley*, 144 Cal. 167, the Supreme Court of California said with reference to the Dental Practice Act of that state:

> "The law, no doubt, is discriminatory, but not in any constitutional sense. It does not discriminate between classes. The discrimination goes to the degree of learning and skill which all applicants for examination must possess. It discriminates between those who have the necessary degree

of learning and skill, and those who have not; between those who are able and those who are unable to acquire it. It is not an unreasonable or capricious discrimination applying to classes as such, or members of a class, but is based solely upon professional qualifications. It is a discrimination which, in the interest of the public welfare, it is the duty of the legislature to make, and the necessity for which, and its nature and extent—whether an examination and right to practice shall depend on the possession by the applicant of a diploma of a dental college only, or be extended to others, and how far—depend primarily upon the judgment of the legislature, which, when reasonably exercised, the courts cannot control."

In the case of *State ex rel. Burroughs* vs. *Webster et al.,* 150 Ind. 607, the court said that statutes denying to all physicians in the state the right to continue their practice without examination, and restricting the practice of medicine to persons who were able to demonstrate their qualifications have been held constitutional as a proper exercise of the police power of the state. This principle was carefully written and is supported by many authorities, as more particularly set forth upon another page.

THE EXEMPTION OF PHYSICIANS AND SURGEONS.

Section 10 of the Optometry Practice Act provides that the law shall not be so construed as to prevent duly licensed physicians and surgeons from treating the human eye. This, counsel says, amounts to discrimination which is invidious and detrimental to

the just interests of his client. He argues that it is not within the power of the legislature to enact a special law under the guise of a police regulation, granting immunity to the practitioner who employs drugs in determining the state of the human eye and imposing restrictions upon those who do not employ drugs.

Counsel states that the law permits the practitioner who uses drugs in his profession to work irreparable injury to the eye without regulation, whereas, those who do not use drugs are obliged to submit to an examination. Of course, this argument is fallacious in that it does not express the full premises. We can conceive that if the practice of those who use drugs in treating the human eye, were not regulated, such discrimination might be improper. However, it is a well-known fact that in all states today there is some regulation of the practice of medicine. In the state of California that regulation is expressed in what is known as the Medical Practice Act, the validity of which act is now being tested before this same tribunal in the case of *P. L. Crane* vs. *Johnson et al.* (October Term, 1916, No. 1031).

The Medical Practice Act referred to contains a prohibition directed to the practice by those who have not qualified under the terms of that act. Therefore, the exception in favor of physicians and surgeons in the Optometry Practice Act is proper under the circumstances.

The exception in favor of the users of drugs is contained in that provision which defines what shall constitute the practice of optometry. It is merely a part of the definition of the practice of optometry, included to make plain that such practice was what the writer of this brief terms the mathematical and mechanical determination of defective vision as opposed to the symptomatical determination by diagnosis.

The section which exempts physicians and surgeons contains the phrase, "duly licensed," modifying the term "physicians and surgeons," so that it is apparent the Optometry Act clearly contemplates that the physician and surgeon, who is exempted from the operation of the law, shall be qualified to examine the eye by virtue of some other specialized training, such as the training which the physician and surgeon must acquire to become duly licensed as such. Such discriminations in the law are always recognized as proper and are not discriminations in the constitutional sense.

Physicians and surgeons are equipped by knowledge, education and experience to do optometry work, and, therefore, should be made exempt from the provisions of the law, which law is intended, like other regulatory measures, to prevent injury to those persons who put trust in the skill of the optometrist whom they consult for the purpose of improving their vision.

Physicians and surgeons, having the same knowledge, or having an education which is intended to give them a knowledge of the structure of the eye,

are in a position to do optometry work, and should, therefore, be exempt from the provisions of the law. Keeping in mind that physicians and surgeons are regulated by a law which is considered reasonably stringent and that they are required to pass an examination more difficult, involved and comprehensive in character, and to include within their educational curriculum much more advanced and technical studies than an optometrist, it is, therefore, clear why this distinction is made.

Discrimination is proper where there is such a distinction in the character of the conditions between which the discrimination is made as to rationally justify a different and unequal application of the law.

In the case of *Watson* vs. *Maryland, supra,* this court considered a provision of the Maryland Medical Practice Act, which granted immunity to those who furnished gratuitous services and to certain others, etc. This court sustained such exception as valid and proper under the circumstances, and in so doing said:

> "The stress of the argument for the plaintiff in error as to these exceptions is put upon the exemption of resident physicians, or assistant physicians, at hospitals, and students on hospital and dispensary duties. The selection of the exempted classes was within the legislative power, subject only to the restriction that it be not arbitrary or oppressive and apply equally to all persons similarly situated. We can not say that these exceptions nullify the law. The reason for them may be that hospitals are very often the subject of state or municipal regulation and control, and

employment in them may be by boards responsible to public authority under state law or municipal ordinance. Certainly the conduct of such institutions may be regulated by such laws or municipal regulations as might not reach the general practitioner of medicine. In any event, we can not say that these exceptions are so wholly arbitrary and have such slight relation to the objects to be attained by the law as to require the courts to strike them down as a denial of the equal protection of the law within the meaning of the federal constitution."

In the case of *People* vs. *Jordan*, 51 Cal. Decisions, 435 (not yet published in official reports), decided March 24, 1916, by the Supreme Court of California, that court considered the same form of argument directed against the Medical Practice Law because of its exemption in favor of what are known as Divine Healers, or those who heal by prayer, but in rendering that decision the court said:

"Coming to the exempted class of drugless healers, namely, those who treat by means of prayer, here, too, there exists an obvious ground for classification. The treatment practiced by many, though not all, of the drugless practitioners, is by manipulation of the bones and the kneading of the muscles and tissues of the person treated. It is apparent that without the proper knowledge of the human body, its organs and functions thereof, or lack of skill, grave consequences to the patient might follow as a result of their treatment; not so, however, as to one who in prayer

invokes Divine power to afford relief to one afflicted by disease. The possession of the prescribed knowledge and skill, without which the chiropractor, osteopath and neuropath is denied the right to practice his treatment, in no wise renders the prayer of one thus treating bodily ills more efficacious in the curing of disease. * * * To our mind it is obvious that no reason exists for requiring the class engaged in the treatment by prayer to possess the knowledge and skill required of others engaged in drugless treatment. The ground for classification is as obvious as the distinction between a physician and surgeon on the one hand, and a drugless practitioner on the other, and as to each of which classes a different rule applies. That the legislature has the right to establish such classification and exempt one class from the operation of a general law, where the same is founded upon some natural, intrinsic or constitutional distinction, is too well settled to require citation of authorities therefor; indeed, its constitutional right so to do is conceded by appellant."

The Illinois Supreme Court, passing upon the propriety of granting immunity to physicians and surgeons, dismissed the subject as one too obviously indisputable to need extended comment.

Kettles vs. *People,* 221 Ill. 221, 232.

The Court in the above case expressed:

"Section 5 of the Dental Act of 1905 prescribes what persons shall be regarded as practicing dentistry, which is followed by proviso: 'Provided, that nothing in this act shall be so con-

strued as to prevent regularly licensed physicians or surgeons from extracting teeth. Further, this act shall not prevent students from performing dental operations under the supervision of competent instructors within a dental school, college or dental department of a university recognized as reputable by the Illinois State Board of Dental Examiners.' It is insisted that this is class legislation, prohibited by said section 22 of article 4 of the constitution, in that it purports to give physicians and surgeons the right to practice dentistry without a license. The clear reading of the statute is that it shall not be 'so construed as to prevent regularly licensed physicians and surgeons from extracting teeth.' The reason for the exception is obvious, and that it is not class legislation is too clear to require serious consideration."

A recent case before this court in which one of the controversies involved the right of the legislature of California to except from the operation of a statute regulating the hours of labor of certain classes of female workers, including nurses, those nurses known as graduate nurses, illustrates the legislative right to draw a distinction in the law between classes of persons standing in different relation to the condition sought to be remedied by the law.

Bosley vs. *McLaughlin et al.*, 236 U. S. 385.

It was said:

"And, in the appellants' offer of proof, it is said that 'graduate nurses working in and employed by hospitals do not ordinarily perform therein the work of nursing the sick, but act as

> overseers to assistants to the medical staff.' It may be, as asserted, that the difference in qualifications between a graduate nurse and an 'experienced nurse' is a difference of technical education only, but that difference exists and is not to be brushed aside. It is one of which the legislature could take cognizance."

We believe it should require no more extended citation of authority to bring to view the extensive foundation upon which rests the legislative discretion in founding statutory distinctions. The discrimination in favor of the users of drugs is proper because custom has developed the practice of optometry to exclude the use of drugs, and because the use of drugs constitutes the practice of medicine. The discrimination in favor of licensed physicians and surgeons is justified because such profession is founded on a training intrinsically inclusive of the knowledge and skill necessary for the examination and repair of the human eye.

We take the liberty of adding the words of this court employed in a discussion of this vital, constitutional question in the late case of *Rast* vs. *Van Deman and Lewis,* 240 U. S. 342, 57.

> "It is established that a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it and the existence of that state of facts at the time the law was enacted must be assured. (*Lindsley* vs. *National Carbonic Gas Co.*, 220 U. S. 61, 78.) It makes no difference that the facts may be disputed

or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety. (*C. B. & Q. R. R.* vs. *McGuire*, 219 U. S. 549, etc.) * * * And, we repeat, 'It makes discriminations if founded on distinctions that we can not pronounce unreasonable and purely arbitrary.' "

It is strongly urged by appellees that the Optometry Practice Act of California is valid and not in conflict with constitutional restrictions.

Respectfully submitted.

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McNAUGHTON *v.* JOHNSON, GOVERNOR OF THE STATE OF CALIFORNIA, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

No. 494. Argued December 12, 1916.—Decided January 8, 1917.

The practice of fitting glasses to the human eye, and treating ocular inflammation, without the use of drugs or surgery, is subject to supervision and regulation under the state police power.

No discrimination violative of the equal protection clause of the Fourteenth Amendment is deducible from the fact that a state law (Laws of California, 1913, c. 598) requiring persons treating inflammation of the eye and fitting glasses without the use of drugs to be licensed under the name of "optometrists" and subjecting their practice to regulation excepts persons who employ drugs in their practice, it appearing that the latter, through another statute, are subject to similar supervision and regulation under another name.

233 Fed. Rep. 334, affirmed.

THE case is stated in the opinion.

Mr. Tom L. Johnston for appellant.

Mr. Robert M. Clarke and *Mr. Thomas Lee Woolwine*, with whom *Mr. U. S. Webb*, Attorney General of the State of California, *Mr. George E. Cryer* and *Mr. Ray E. Nimmo* were on the brief, for appellees.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This case was submitted with *Crane* v. *Johnson*, *ante*, 339. It was considered in the District Court with that case, three judges sitting as in that case. It comes here on appeal from an order denying an interlocutory injunction. The court entertained jurisdiction upon the authority of *Raich* v. *Truax*, 219 Fed. Rep. 273, 283; *Truax* v. *Raich*, 239 U. S. 33.

The court in denying the injunction said "that the granting of such orders is within the sound discretion of the court, and in the exercise of such discretion, based upon the averments of the bills, we are of opinion that the application should be denied." The court did not pass upon the merits, expressing a doubt of its authority to do so as the court said it was composed of three judges "under statutory requirement."

Appellant—we shall call her complainant, and state

narratively the facts she alleged—is a regularly graduated opthalmologist, which is a school of scientific learning and practice confined to the treatment of the inflammation of the eye and its membranes and in fitting glasses to the human eye. She has practiced her profession in the City and County of Los Angeles for the past three years and is dependent upon the proceeds of her labor and services. She does not employ either medicine, drugs or surgery, nor is there anything in her practice hurtful to the individual or dangerous to society.

In her practice it is absolutely necessary and indispensable that she measure the powers and range of human vision without the use of drugs and there is no law in the State of California prescribing an examination for and regulating the practice of opthalmology.

At its 40th session the legislature of California enacted a statute by which it provided that it should be unlawful for any person to engage in the practice of optometry without first having obtained a certificate of registration from the State Board of Optometry under an act to regulate that practice approved March 20, 1903, and the acts amendatory thereof.

The practice of optometry is defined to be "the employment of any means other than the use of drugs for the measurement of the powers or range of human vision or the determination of the accommodative and refractive states of the human eye or the scope of its functions in general or the adaptation of lenses or frames for the aid thereof."

The board is given the power, among others, to visit schools where the science of optometry is taught and accredit such as the board finds give a sufficient course of study for the preparation of optometrists; to keep a register of all persons to whom certificates of registration have been issued and of all itinerant licenses, and to grant or refuse or revoke such certificates. The act

prescribes a course of examination, describes the particulars of the examinations, and provides that every applicant for an examination upon passing it shall be entitled to be registered in the board's register of optometrists and a certificate of registration shall be issued to him.

"At such examinations the board shall examine applicants in the anatomy of the eye, in normal and abnormal refractive and accommodative and muscular conditions and co-ordination of the eye, in subjective and objective optometry, including the fitting of glasses, the principles of lens grinding and frame adjusting, and in such other subjects as pertain to the science and practice of optometry, such subjects to be enumerated in publication by the board. . . . All such applicants without discrimination, who shall satisfactorily pass such examination shall thereupon be registered in the board's register of optometrists and a certificate of registration shall be issued to them, under the seal and signature of the members of said board upon payment of a fee of five dollars. Such certificate shall continue in force until the first day of August in the year next succeeding."

Before engaging in practice it shall be the duty of each registered optometrist to notify the board in writing of the place or places where he is to engage or intends to engage in practice and of changes in such places.

There are other provisions intended to fortify those above mentioned, and violations of the act are made misdemeanors, with fines and imprisonment, increasing with repetition of the offense.

It is provided that the act shall not be construed to prevent duly licensed physicians and surgeons from treating the human eye nor to prohibit the sale of complete ready-to-wear eyeglasses as merchandise from a permanent place of business in good faith and not in evasion of the act by any person not holding himself out as competent to examine and prescribe for the human eye.

Registry certificates may be revoked for certain specified causes.

Complainant charges that the act offends the Fourteenth Amendment of the Constitution of the United States in that it deprives her of her property without due process of law and denies her the equal protection of the laws, and as specifications of the last she instances the exemption from the provisions of the act of licensed physicians and surgeons; the appropriation to the sole use of registered optometrists of the right to employ any means other than the use of drugs in the measurement of the powers or range of vision; the denial to all other schools of scientific learning and practice the right to measure the range of human vision other than by the use of drugs on equal terms with the physician and surgeon; and contends generally that her occupation being a lawful one, not hurtful to the individual or dangerous to the community, the State has no power to impose discriminatory regulations upon it.

She alleges her competency to practice her profession and apply its treatment, that appellees are threatening to enforce the law, and hence prays temporary and permanent injunctions.

These specific objections are brought down to the general objection that the statute discriminates against those who employ any other means than the use of drugs and, therefore, "creates a monopoly favored and protected by law, in the interest of practitioners who employ drugs in determining the accommodative and refractive states of the human eye."

To sustain the statute appellees adduce the police power of the State; against the statute complainant urges the Fourteenth Amendment and its prohibition of discrimination. The case requires, under the averments of the bill, adjustment of these contentions.

It is established that a State may regulate the practice

of medicine, using this word in its most general sense. *Dent* v. *West Virginia*, 129 U. S. 114; *Hawker* v. *New York*, 170 U. S. 189; *Reetz* v. *Michigan*, 188 U. S. 505; *Watson* v. *Maryland*, 218 U. S. 173; *Collins* v. *Texas*, 223 U. S. 288.

Complainant tries to escape from the rulings in those cases by asserting a discrimination against her. She is an opthalmologist, she avers, "which is a school of scientific learning and practice confined to the treatment of the inflammation of the eye and its membranes and in fitting glasses to the human eye," and that she has practiced her profession for the past three years, and does not employ medicine, drugs or surgery. She, however, attacks the statute because, to use the language of her counsel, it "arbitrarily discriminates against every other school of scientific knowledge and practice in favor of the school employing drugs in determining the accommodative and refractive states of the human eye." It undoubtedly does, but gives the name of the school that of "optometry" and its practitioners "optometrists." We cannot suppose that any injury is done her by the difference in names, and yet she gives no other tangible ground of complaint. Whether they are different and whether the difference is of substantial or unsubstantial degree she does not inform us. She practices one of them in preference to the other, and for the practice of that one the State has declared that its certificate of competency is necessary. The cases cited above establish that the State has such power and it requires no more of complainant than it requires of any other opthalmologist, to use her word, or of any other optometrist, to use the word of the statute.

The District Court was, therefore, right when it decided that on the averments of the bill complainant was not entitled to an injunction.

Decree affirmed.